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Supreme Court of the United States

RICKY BROWN, *et al.*,

Petitioners,

RAISHAWN MORRIS,

Petitioner,

CHARLES BATTISTE, *et al.*,

Petitioners,

—v.—

CITY OF ONEONTA, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred in concluding that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is not implicated by a complaint that alleges that law-enforcement officials, in response to a report that a young, black male committed a crime, targeted for questioning and physical examination the entire minority community of a municipality solely and expressly on the basis of race and to the exclusion of all nonracial identifying information?

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to this appeal are listed below. Because no corporations are involved in this matter, there are no parent companies and no subsidiaries to list.

RICKY BROWN, on behalf of himself and all other persons similarly situated; JAMEL CHAMPEN, on behalf of himself and all other persons similarly situated; SHERYL CHAMPEN, on behalf of herself and all other persons similarly situated; HOPETON GORDON, on behalf of himself and all other persons similarly situated; JEAN CANTAVE, on behalf of himself and all other persons similarly situated; RAISHAWN MORRIS, on behalf of himself and all other persons similarly situated; TIM RICHARDSON, on behalf of themselves and all other persons similarly situated; DARRYL TAYLOR, on behalf of themselves and all other persons similarly situated; ROBERT WALKER, on behalf of themselves and all other persons similarly situated; CLEMENT MALLORY, on behalf of themselves and all other persons similarly situated; RONALD SANCHEZ, on behalf of themselves and all other persons similarly situated; DARNELL LEMONS, on behalf of themselves and all other persons similarly situated; JOHN BUTLER, on behalf of themselves and all other persons similarly situated; JASON CHILDS, on behalf of themselves and all other persons similarly situated; PAUL HEYWARD, JR., on behalf of themselves and all other persons similarly situated; RONALD JENNINGS, on behalf of themselves and all other persons similarly situated; PAUL HOWE, on behalf of themselves and all other persons similarly situated; BUBU

DEMASIO, on behalf of themselves and all other persons similarly situated; WILSON ACOSTA, on behalf of themselves and all other persons similarly situated; CHRIS HOLLAND, on behalf of themselves and all other persons similarly situated; JERMAINE ADAMS, on behalf of themselves and all other persons similarly situated; FELIX FRANCIS, on behalf of themselves and all other persons similarly situated; DANIEL SONTAG, on behalf of themselves and all other persons similarly situated; RONALD LYNCH, on behalf of themselves and all other persons similarly situated; KENNETH MCCLAIN, on behalf of themselves and all other persons similarly situated; HERVEY PIERRE, on behalf of themselves and all other persons similarly situated; VINCENT QUINONES, on behalf of themselves and all other persons similarly situated; LAURENCE PLASKETT, on behalf of themselves and all other persons similarly situated; LAMONT WYCHE, on behalf of themselves and all other persons similarly situated; STEVEN YORK, on behalf of themselves and all other persons similarly situated; TYRONE LOHR, on behalf of themselves and all other persons similarly situated; KING GONZALEZ, on behalf of themselves and all other persons similarly situated,

Petitioners,

RAISHAWN MORRIS,

Petitioner,

CHARLES BATTISTE, on behalf of himself and all other persons similarly situated; WAYNE LEWIS, on behalf of himself and all other persons similarly situated; MICHAEL CHRISTIAN, on behalf of themselves and all other persons

similarly situated; MAJOR BARNETT, on behalf of himself and all other persons similarly situated,

Petitioners

—v.—

CITY OF ONEONTA, NEW YORK; POLICE DEPARTMENT OF THE CITY OF ONEONTA, NEW YORK; JOHN J. DONADIO, Chief of Police of the City of Oneonta, in his individual and official capacities; JOSEPH REDMOND, Oneonta Police Officer, in his individual and official capacities; WILLIAM M. DAVIS, Oneonta Police Officer, in his individual and official capacities; X. OLSEN, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS OFFICERS AND INVESTIGATORS OF THE POLICE DEPARTMENT OF THE CITY OF ONEONTA, in their individual and official capacities; THE STATE OF NEW YORK; STATE UNIVERSITY OF NEW YORK; STATE UNIVERSITY OF NEW YORK, COLLEGE AT ONEONTA ("SUCO"); NEW YORK STATE DIVISION OF STATE POLICE; H. KARL CHANDLER, New York State Police Investigator, in his individual and official capacities; ROBERT FARRAND, New York State Police Troop C Commander, in his individual and official capacities; GEORGE CLUM, New York State Police Investigator, in his individual and official capacities; KEVIN MORE, New York State Police Investigator, in his individual and official capacities; JOHN WAY, New York State Police Investigator, in his official capacities; MARK KIMBALL, New York State Trooper, in his individual and official capacities; KENNETH GRANT, New York State Trooper, in his individual and official capacities; NEW YORK STATE TROOPER FARRAGO, in his individual

and official capacities; ANONYMOUS STATE POLICE OFFICIALS AND INVESTIGATORS, in their individual and official capacities; SUCO DEPARTMENT OF PUBLIC SAFETY; MERRITT HUNT, SUCO Department of Public Safety Officer, in his individual and official capacities; TIM JACKSON, SUCO Department of Public Safety Officer, in his individual and official capacities; JOHN EDMONDSON, SUCO Department of Public Safety Officer, in his individual and official capacities; HARTMARK LEIF, in his individual and official capacities; ERIC WILSON, in his individual and official capacities; CARL SHEDLOCK, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS PUBLIC SAFETY OFFICERS, in their individual and official capacities; ANONYMOUS SUCO COMPUTER EMPLOYEES, in their individual and official capacities; SEAN RALPH, Otsego County Sheriff's Deputy; CHRIS LEHENBAUER, Otsego County Sheriff's Deputy; ANONYMOUS OTSEGO CITY; ANONYMOUS OTSEGO COUNTY SHERIFF'S DEPUTIES, INVESTIGATORS AND/OR OFFICERS,

Respondents.

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CITY OF ONEONTA, NEW YORK, *et. al.*

Respondents.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioners respectfully request that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Second Circuit on August 8, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals that is the subject of this writ is reported at 221 F.3d 329 (2d Cir. 2000) and is set out in the appendix to this petition at 1-27. That decision amended and vacated an original opinion, which is reported at 195 F.3d 111 (2d Cir. 1999) and is set out in the appendix at 28-52. Various opinions filed by judges of the Court of Appeals in denying a petition for rehearing and rehearing *in banc* are reported at 235 F.3d 769 (2d Cir. 2000) and are set out in the appendix at 53-111. The original District Court opinion, which is unpublished, is set out in the appendix at 112-39.

JURISDICTION

This is a petition for a writ of *certiorari* from an amended opinion and judgment of the United States Court of Appeals for the Second Circuit entered on August 8, 2000. That court denied a petition for rehearing and rehearing *in banc* on December 18, 2000. On February 12, 2001, Justice Ginsberg extended the deadline for the filing of this petition to and including May 17, 2001. Pet. App. at 221. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The pertinent provisions of the United States Constitution involved in this case are found in Section 1 of the Fourteenth Amendment, which provides as follows:

All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Court of Appeals' judgment for which the petitioners seek a writ of *certiorari* affirmed a District Court order dismissing an equal protection claim asserted in the petitioner's second amended federal complaint. Given this, the facts relevant to this petition are to be taken from that complaint, which is set out at pages 140-220 of the appendix, and under long-established principles these facts are to be taken as true.

So understood, this case concerns the constitutionality of actions undertaken by law-enforcement officials in the City of Oneonta in upstate New York who stated they had received a report that a crime had been committed by a young, black male who may have cut his hand or forearm during the incident. In response to this report, state and local police officials targeted for questioning and physical examination every black male at the State University of New York, College of Oneonta (SUCO), the campus of which was located in the vicinity of the crime. When this action did not result in an arrest, the officials sought to question and examine the hundreds of non-white

residents in the Oneonta area and did so solely on the basis of their race.

Though the second amended complaint exceeds one hundred pages,[1] its essence is spelled out in its opening paragraphs:

> On September 4, 1992, between approximately 12:00 a.m. and 2:00 a.m., a 77-year-old woman was allegedly attacked in the course of what was reported as an attempted burglary in the house of a friend with whom she was staying. Although the room in which she was attacked was dark, the woman told police that she saw the assailant's hand or lower forearm and, based upon that observation, concluded that the assailant was black. She further stated that the assailant was young because she heard him run quickly across the room.
>
> Based upon this limited information, defendants law enforcement officials first

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[1]The complaint contains 346 numbered paragraphs but includes just twenty-two paragraphs of general factual allegations about the events at issue, *see* Second Complaint ¶¶ 2-4, 87-101, 216-19 (Pet. App. at 143-43, 162-65, 187-88), and then another handful of allegations concerning the experiences of each of thirty-seven named plaintiffs, *see id.* ¶¶ 102-215 (Pet. App. at 165-87). Most of the complaint is devoted to identifying the parties, *see id.* ¶¶ 9-86 (Pet. App. at 144-62), and to spelling out the particulars of twenty different causes of action, *see id.* ¶¶ 221-346 (Pet. App. at 188-218).

> wrongfully sought and obtained from SUCO [officials] a list containing the names and addresses of all male African-American students at SUCO. The law enforcement officials then sought out, approached, questioned, seized and/or searched every person on that list.
>
> When these efforts failed to result in the apprehension of a suspect, the law enforcement officials turned their focus on every non-white person in the City of Oneonta, and conducted a "sweep" of the entire City of Oneonta. During the "sweep," which occurred over a five-day period, the officials, without any basis for suspecting any individual approached except for his or her race, attempted to stop, question and physically inspect the hands of any and every non-white person in and around the City of Oneonta.

Second Amended Complaint ¶¶ 2-4 (Pet. App. at 142-43). The objective of the sweep, according to a New York State Police Investigator, was "to examine the hands of all the black people in the community." *Id.* ¶ 100 (Pet. App. at 165).

Pursuant to this sweep, law-enforcement officials stopped, questioned, examined and/or searched a large number of individuals at locations around Oneonta "including the bus stations, in and around plaintiffs' apartments, dorm residences, homes, on the SUCO campus, and while plaintiffs merely walked on the public streets." Second Amended Complaint ¶ 101 (Pet. App. at 165). "The sole reason that each and every plaintiff was sought out, approached for questioning, seizure

and/or search by the law enforcement officials was the color of plaintiffs' skin." *Id.* ¶ 216 (emphasis added) (Pet. App. at 187).

Early in 1993 individuals who had been caught up in the sweep filed suit in the United States District Court for the Northern District of New York on behalf of themselves and a class of similarly situated individuals. Pet. App. at 8-9 (panel opinion discussing procedural history). Following proceedings in the District Court unrelated to this petition, a second amended complaint was filed in January 1995 on behalf of thirty-seven individuals and a putative class that included a subclass "of non-white persons sought out, approached, questioned, seized and/or searched by law enforcement officials during the period of September 4 through September 9, 1992." Second Amended Complaint ¶ 47 (Pet. App. at 153).[2]

In addition to Fourth Amendment and other claims not relevant to this petition, the second amended complaint alleged that various law-enforcement officials responsible for the sweep had violated the plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment by singling them out for law-enforcement investigation "solely on the basis of their race." For instance, the second cause of action asserted,

> By seeking out, approaching,

---

[2]The other subclass included "those persons whose names were on the list wrongfully generated by SUCO at the request of law enforcement officials," Second Amended Complaint ¶ 47 (Pet. App. at 153), but the claims of that group dropped out of the case when the Second Circuit held that the defendants were entitled to qualified immunity with respect to the claims of that subclass, Pet. App. at 10 n.2 (discussing earlier decision dismissing claims of that subclass).

> questioning, seizing and/or searching the named members of [the subclass] and all other persons comprising [the subclass] solely on the basis of their race and not based upon the appropriate level of suspicion as required by New York law, defendants law enforcement officials denied them equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Second Amended Complaint ¶ 232 (Pet. App. at 191). *See also id.* ¶ 245 (asserting equal protection claim based on allegation that class members were singled out "solely on the basis of their race") (Pet. App. at 194); *id.* ¶ 268 (same) (Pet. App. at 199-200); *id.* ¶ 289 (same) (Pet. App. at 205-06); *id.* ¶ 296 (same) (Pet. App. at 207).

The District Court, which had jurisdiction over the equal protection claims pursuant to 28 U.S.C. §§ 1331 and 1343, dismissed them on the ground that the plaintiffs had failed "to allege that a similarly situated group of non-minority individuals was treated differently." Pet. App. at 126 (District Court opinion). After dismissing or granting summary judgment to the defendants on other claims and after the parties entered into several stipulations necessary to convert the District Court decision into an appealable final order, the plaintiffs appealed to the Second Circuit. *See* Pet. App. at 12-13.

In a decision dated October 26, 1999, a panel of the Second Circuit reversed the District Court's granting of summary judgment to the defendants on some of the plaintiffs' Fourth Amendment claims, but the panel "affirm[ed] the dismissal of plaintiffs' claims under the Equal Protection

Clause." Pet. App. at 51.

The plaintiffs moved for reconsideration and rehearing *in banc*. On August 8, 2000, the panel vacated its original decision and issued an amended opinion that qualified the panel's original equal protection analysis but nonetheless affirmed the dismissal of the plaintiffs' equal protection claims. *See* Pet. App. at 26. In doing so, the court first explained that a plaintiff alleging a violation of the Equal Protection Clause can do so in a variety of ways, including an allegation that a law or policy "expressly classifies persons on the basis of race." Pet. App. at 15 (internal quotations and citation omitted). It then noted that the plaintiffs contended "that the defendants utilized an express racial classification by stopping and questioning plaintiffs solely on the basis of their race." *Id.*

The court next rejected the District Court's conclusion about the necessity of alleging different treatment of similarly situated persons: "Plaintiffs are correct, however, that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express racial classification." Pet. App. at 16. It nonetheless held that the plaintiffs had failed to plead an equal protection claim because, according to the court, "they have not identified any law or policy that contains an express racial classification." Pet. App. at 16-19.

The plaintiffs again moved for reconsideration and rehearing *in banc*. These motions were denied over the dissent of five of the court's twelve judges and prompted six judges to publish or join opinions. *See* Pet. App. at 57 (opinion of Walker, C.J.); *id.* at 74 (opinion of Jacobs, J.); *id.* at 77 (opinion of Calabresi, J., joined by Straub, Parker, and Sotomayor, J.J.); *id.* at 104 (opinion of Straub, J., joined by Calabresi, J.). The

central point of discussion in the court was the one presented by this petition: whether the protections of the Equal Protection Clause are triggered when law-enforcement officials disregard every aspect of a description except for the alleged perpetrator's race and then seek out individuals for questioning and physical examination based solely on their race.

Judge Walker, who authored the two panel opinions in this matter and now serves as Chief Judge for the Second Circuit, wrote first. As an initial matter, after repeating the panel's view that the plaintiffs' complaint could not be read to contend that the defendants had disregarded nonracial information and instead had acted solely on the basis of race, Judge Walker asserted that it was not credible to suggest that the police would do such a thing. Pet. App. at 64 (describing as "nonsensical" the suggestion that "the police, who have been given a description of the attacker, would disregard the description and look for someone else"). More significantly, Judge Walker then argued that, even if the police did ignore all nonracial information provided to them in a description that included racial information and in fact sought out persons solely on the basis of their race, that would not implicate the Equal Protection Clause. *See id.* at 66-67. For policy reasons discussed below, *see infra* at 23-27, Judge Walker argued that applying the Equal Protection Clause to such race-based actions would be "flawed and unworkable." *Id.* at 66.

Judge Jacobs also authored an opinion concurring in the denial of the motion for rehearing *in banc*. Like Chief Judge Walker, he expressed incredulity at the notion that the police would stop and question people solely on the basis of their race when nonracial information was available. Pet. App. at 74-75. More significantly, he also took the position that, even if the

police did engage in such activity, that should not implicate the Equal Protection Clause. According to Judge Jacobs, the contention that such race-based, law-enforcement action triggers equal protection "is based on unexamined notions now current in the bien pensant community rather than on any previously understood principles of policing or (for that matter) constitutional law, and is therefore incompletely baked." *See id.* at 76.

The opinions of Judges Walker and Jacobs were prompted principally by a dissent authored by Judge Calabresi and joined by Judges Straub, Parker, and Sotomayor.[3] After reviewing the facts as alleged in the second amended complaint, these four members of the Second Circuit concluded that the panel had fundamentally misconstrued the complaint and therefore had ignored the important equal protection issue it presented:

> Accordingly, the issue before the panel was: Did the plaintiffs adequately plead that state officials imposed a constitutionally suspect classification? It is this question that the panel, in my view, fails adequately to answer. For, instead of considering, on the facts that we must take as true, whether the police *created and acted upon a racial classification by setting aside all but the racial elements in the victim's description*, the panel examines the purely hypothetical question of whether, *had the police acted on the victim's description*, such behavior

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[3] Judge Kearse dissented without opinion. *See* Pet. App. at 77.

would have imposed a racial classification.

Pet. App. at 84 (emphasis in original, citation omitted). And on the question whether the express racial classification fairly alleged by the plaintiffs was subject to strict scrutiny, Judge Calabresi replied, "The answer to that question, all but ignored by the panel, seems to me -- both on the precedents and on plain logic -- to be a resounding yes." Pet. App. at 85 (citations omitted).

On February 12, 2001, Justice Ginsberg extended to May 17, 2001, the date by which the plaintiffs could file this petition for a writ of *certiorari*. Pet. App. at 221-22.[4]

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[4]The panel opinion left open the possibility that the plaintiffs could seek to amend their complaint further. *See* Pet. App. at 20 n.9. Pursuant to this, the plaintiffs on March 9, 2001, filed a motion to file a third amended complaint. By oral directive to the parties, the District Court on March 28, 2001, stayed consideration of that motion pending the Court's disposition of this petition.

REASONS FOR GRANTING THE WRIT

At issue here is whether the Equal Protection Clause places any limits on the authority of law-enforcement officials to disregard every aspect of the description of a suspect except for his or her race and then engage in a dragnet sweep throughout a municipality targeting the members of an entire minority community for questioning and physical examination solely because of their race. By dismissing the petitioners' equal protection claim, the Second Circuit effectively ruled that such race-based actions are invisible to the Equal Protection Clause.

There is a burgeoning controversy in our society about the role of race in the practices of law-enforcement agencies. *See, e.g.*, "Patterns of Police Violence," N.Y. Times, Apr. 18, 2001 (lead editorial addressing race-based, law-enforcement controversies across the country and noting that "police shootings and the possibility of racial profiling in street and traffic arrests have raised heightened concern about a systemic disparity in the treatment of whites and minorities by police"). Indeed, concerns about the inappropriate use of race in law enforcement have become so pronounced that Attorney General John Ashcroft, at the direction of President George W. Bush, recently asked Congress to pass legislation authorizing the Justice Department to analyze nationwide data to assess the extent of racial profiling by law-enforcement agencies. As Attorney General Ashcroft explained to Senate Judiciary Committee Chairman Orrin Hatch in a letter dated February 28, 2001:

> As you know, I received a directive from the President late yesterday asking me to work

> with Congress to develop effective methods to determine the extent to which law enforcement officers in the United States engage in the practice of racial profiling. As you further know, racial profiling is the use of race as a factor in conducting stops, searches, and other investigative procedures. While we all recognize that the overwhelming majority of law enforcement officers perform their demanding jobs in an outstanding manner, any practice of racial profiling, even by a small minority, is unacceptable.

Letter to Honorable Orrin G. Hatch from Attorney General John Ashcroft (Feb. 28, 2001) (Pet. App. at 223).

The issue of racial profiling and its constitutional implications has arisen in three recent cases before this Court. *See Atwater v. City of Lago Vista*, 69 U.S.L.W. 4262, 4278 (Apr. 24, 2001) (O'Connor, J., dissenting, joined by Stevens, Ginsberg, and Breyer, J.J.) (in dissenting from holding that the Fourth Amendment does not prohibit police officers from effecting full custodial arrests for even minor traffic offenses, stating that "[i]ndeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual"); *Illinois v. Wardlow*, 528 U.S. 119, 132-34 & nn. 7-9 (2000) (Stevens, J. dissenting, joined by Souter, Ginsberg and Breyer, J.J.) (in dissenting from holding that Fourth Amendment does not prohibit police officers from relying on person's flight as basis for *Terry* stop, noting that residents of minority communities may have legitimate reasons for fleeing out of fear of race-based, law-enforcement actions and

discussing reports of racial profiling by law-enforcement agencies around the country); *Whren v. United States* 517 U.S. 806, 810, 813 (1996) (in rejecting argument that inquiry into a police officer's motive for a vehicle stop was necessary under the Fourth Amendment because "police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants," stating that Equal Protection Clause would be basis for challenge to race-based selective enforcement of laws).

Nonetheless, the Court has yet to specify what limits the Equal Protection Clause imposes on the use of race in law-enforcement investigations. Because of the national importance of the issue and because the Second Circuit decision in this matter -- particularly as subsequently explained and amplified by its author, Judge Walker -- effectively endorses race-based sweeps of minority populations, this case merits plenary review.

A COMPLAINT THAT ALLEGES THAT LAW-ENFORCEMENT OFFICIALS, IN RESPONSE TO A SUSPECT DESCRIPTION THAT INCLUDED RACE, TARGETED ALL THE MEMBERS OF THE MINORITY COMMUNITY OF A LOCALITY FOR QUESTIONING AND PHYSICAL EXAMINATION SOLELY ON THE BASIS OF THEIR RACE STATES A CAUSE OF ACTION UNDER THE EQUAL PROTECTION CLAUSE.

It would seem indisputable that the Equal Protection Clause would be violated by a police department practice that expressly targeted every black person -- regardless of gender, age, size, whereabouts, or any other attribute -- within a locality for questioning in response to a report that a crime had been committed by a person the description of whom included the fact that he or she was black. Yet, that is what is alleged to have happened in Oneonta in a complaint that the Second Circuit held did not even implicate the Fourteenth Amendment.

A. The Complaint Alleges that Law-Enforcement Officials Targeted the Plaintiffs for Investigation Solely on the Basis of their Race and in Disregard of All Other Nonracial Descriptive Information.

As the opinions issued in conjunction with the denial of the plaintiffs' request for rehearing *in banc* reveal, at the heart of this case is a dispute about the applicability of the Equal Protection Clause to law-enforcement sweeps that target entire populations solely on the basis of race when the police receive a description of a suspect that includes race as one element of

the description. The second amended complaint repeatedly and expressly alleges in specific terms that the defendants targeted the plaintiffs for investigation solely and expressly on the basis of their race. *See* Second Amended Complaint ¶ 4 ("During the 'sweep,' which occurred over a five-day period, the officials, without any basis for suspecting any individual approached except for his or her race, attempted to stop, question and physically inspect the hands of any and every non-white person in and around the City of Oneonta.") (Pet. App. at 143); *id.* ¶ 216 ("The sole reason that each and every plaintiff was sought out, approached for questioning, seizure and/or search by the law enforcement officials was the color of plaintiffs' skin.") (Pet. App. at 187); *id.* ¶ 232 (asserting equal protection claim based on allegation that class members were singled out "solely on the basis of their race") (Pet. App. at 191); *id.* ¶ 245 (same) (Pet. App. at 194); *id.* ¶ 268 (same) (Pet. App. at 199-200); *id.* ¶ 289 (same) (Pet. App. at 205-06); *id.* ¶ 296 (same) (Pet. App. at 207); *see also id.* ¶ 100 (alleging that two newspapers quoted a New York State Police investigator as stating that the objective of the sweep was to try "to examine the hands of all the black people in the community") (Pet. App. at 165); *id.* ¶ 101 ("[D]efendants law enforcement officials sought out, approached, questioned, seized, and/or searched any and all non-white members of the SUCO and Oneonta communities.") (Pet. App. at 165).

Consistent with these allegations, one of the named plaintiffs is a woman named Sheryl Champen who was stopped and questioned by a police officer at the Oneonta bus station as she was attempting to board a bus. According to the complaint,

> As she stood in line to board the bus at the Oneonta bus station, a police car pulled up

> and parked near the bus. She was approached by a police officer who asked her to show him some identification. When Ms. Champen asked what for, the policeman stated that a black male had attempted a burglary earlier that day.
>
> When Ms. Champen pointed out to him that he should be looking for a black male, the policeman said that if Ms. Champen wanted to board the bus, she would have to show him some identification.

Second Amended Complaint ¶¶ 115-16 (emphasis in original) (Pet. App. at 168).

Notwithstanding these allegations, the panel characterized the complaint not as alleging that the plaintiffs were stopped solely on account of their race but instead only as alleging that they were stopped because they matched a description of an assailant that included race as well as other factors:

> [P]laintiffs' factual premise is not supported by the pleadings: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by

> the victim of the assault -- a description that included race as one of several elements -- defendants did not engage in a suspect racial classification that would draw strict scrutiny.

Pet. App. at 16-17. As for the named plaintiff Sheryl Champen, the panel dismissed the significance of the allegations concerning her with the contention that "this single incident, to the extent it was related to the investigation, is not sufficient to support an equal protection claim under the circumstances of this case." *Id.* at 19. And in his subsequent opinion supporting the denial of reconsideration *in banc*, Judge Walker went so far as to hypothesize a scenario to explain away the allegations concerning Ms. Champen: "[I]t is far more likely that the police, who after stopping her did not ask to see her hands, were initially mistaken about her sex or, because she was boarding a bus, feared losing a person with relevant information." *Id.* at 64-65.

This analysis violates the most basic precepts governing motions to dismiss claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. All factual allegations are to be taken as true and reasonable inferences are to be drawn in favor of the plaintiff. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The contention that the plaintiffs were stopped solely on the basis of their race and to the exclusion of all other nonracial descriptive information is not, as suggested by the panel, a "premise" of the plaintiffs' pleadings; rather it is the express, core, and oft-repeated factual contention of the complaint. And the incident concerning the named plaintiff Sheryl Champen is offered simply as one example of this practice, not as the sole example, and cannot be used to negate the scope of the repeated allegations that the defendants

stopped an entire class of residents of Oneonta "solely on the basis of their race." *See, e.g.*, Second Amended Complaint ¶ 4 (stating that persons were stopped and questioned during five-day sweep "without any basis for suspecting any individual approached except for his or her race"; emphasis added) (Pet. App. at 143). Consistent with this, the class in this case is defined to include "non-white persons sought out, approached, questioned, seized and/or searched," *see id.* ¶ 47 (Pet. App. at 153); it is not limited to the subset of such non-white persons who are young and male.

The plaintiffs' second amended complaint cannot be read, on a motion to dismiss, as alleging anything short of a practice by the defendants of targeting the minority residents of Oneonta for law-enforcement investigation solely and expressly on the basis of their race. The panel's characterization of the complaint as alleging that police officials in Oneonta simply stopped those persons who matched the race, age, and gender of the description of a suspect given to the police officials fails to treat the complaint's express allegations as being true; indeed, it ignores the express allegations and draws inferences against the plaintiffs. The panel's reformulation of the complaint is incorrect as a matter of law. *Cf. Hunt v. Cromartie*, 526 U.S. 541, 548-54 (1999) (in case alleging that election district was drawn for racial reasons in violation of Equal Protection Clause, reversing summary judgment for plaintiffs alleging racial motive on grounds that three-judge District Court had failed to draw reasonable inferences in favor of party opposing motion).

B. The Equal Protection Clause Is Implicated by Law-Enforcement Practices Targeting Entire Minority Communities for Investigation Solely on the Basis of Race and to the Exclusion of All Other Nonracial Information.

Recognizing that the complaint must be read to allege that the defendants targeted the minority community of Oneonta for questioning and physical examination solely and expressly on the basis of race, the constitutional question presented by the complaint is whether such law-enforcement action implicates the Equal Protection Clause. Given the decades of relevant law from this Court, this question must be answered in the affirmative.

As an initial matter, it is worth noting that the Court has addressed the unconstitutionality of law-enforcement stops based on national origin, albeit in the context of the Fourth Amendment. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court held that national origin alone cannot provide a basis for even the minimal reasonable suspicion necessary to effect a *Terry*-type vehicular stop of individuals driving in a car near a border to determine whether those individuals were "illegal aliens." As the Court explained,

> In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think

> that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens nor a reasonable belief that the car concealed other aliens who were illegally in the country.

422 U.S. at 885-86 (footnote omitted). And in language that bears directly on the controversy here, the Court continued,

> Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

Id. at 886-87 (emphasis added; footnote omitted).

Though *Brignoni-Ponce* establishes that the Fourth Amendment bars law enforcement practices based solely on national origin -- and perforce race -- the Court has not specifically considered the applicability of the Equal Protection Clause to race-based, law-enforcement practices. It has addressed, however, the constitutionality of raced-based government action in a variety of other contexts over the last fifty years and uniformly has held that such action is subject to serious scrutiny under the Equal Protection Clause. *See, e.g., Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954) (holding unconstitutional state statute segregating schools "solely on the basis of race" on grounds it violated Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1, 2, 12

(1967) (holding unconstitutional state statute barring certain marriages "solely upon distinctions drawn according to race" and stating, "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."); *McLaughlin v. Florida*, 379 U.S. 184, 191-94 (1964) (holding unconstitutional state statute criminalizing cohabitation solely on basis of race on grounds it violated Equal Protection Clause); *cf. Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying heightened scrutiny under Fifth Amendment to wartime measures directed at persons of Japanese ancestry).

Given the Court's long-standing and unequivocal treatment of race-based government discrimination, the conclusion that the Equal Protection Clause is not even implicated by a law-enforcement practice of stopping and questioning large numbers of persons solely and expressly on the basis of their race and in disregard of the nonracial information provided to the police can stand only if one contends that this specific form of race-based action is of a type that somehow is exempted from the otherwise well-established protections of the Fourteenth Amendment. Yet nothing in this Court's Fourteenth Amendment jurisprudence supports such a contention. Indeed, in the decision in which the Court perhaps has come closest to the issue, it clearly suggested to the contrary.

In *Whren v. United States*, 517 U.S. 806 (1996), the Court was asked to hold that the Fourth Amendment allows a court to consider whether an articulated legitimate basis for a police stop in fact is a pretext to obscure an unlawful purpose. In support of this position the petitioners, who were black, had argued that such a motive inquiry was necessary because

"police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants." *Id.* at 810. In a unanimous opinion authored by Justice Scalia, the Court rejected the petitioners' Fourth Amendment claim but responded to their argument about race-based law enforcement as follows:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

Id. at 813. If the Equal Protection Clause is implicated when police officers enforce racially-neutral traffic laws in a race-based manner, then surely it is implicated when they dispense with the pretense of racially-neutral action and stop and question individuals expressly and solely on account of their race while disregarding nonracial information, as the complaint alleges happened in Oneonta.

C. The Policy Concerns Expressed by Judges Walker and Jacobs Are Not Implicated by Instances in Which Law-Enforcement Officials Rely Solely on Race to the Exclusion of Nonracial Information.

In rejecting the suggestion that race-based sweeps must pass muster under the Equal Protection Clause, Judges Walker and Jacobs did not identify any decisions from this Court or any other court that supported their position. *See* Pet. App. at 66-67 (opinion of Walker, C.J.); *id.* at 75-77 (opinion of Jacobs,

J.). Rather, they relied entirely upon policy concerns that the approach advanced by petitioners would hamper law-enforcement efforts in light of the fact that law-enforcement officials often receive descriptions of suspects that include racial information. While law-enforcement officials may in fact often receive such descriptions, the petitioners respectfully submit that the ultimate concerns expressed by Judges Walker and Jacobs are unfounded.

In objecting to the suggestion that the Equal Protection Clause applies when law-enforcement officials rely solely on race to the exclusion of nonracial information, Judge Walker first argued,

> Innocent situations that could trigger liability under [the suggestion] spring to mind. For instance, the proposed rule would apply to any situation in which the police were trying to find a fleeing suspect in a defined and limited area, such as a restaurant, a sidewalk, a parking lot, or a building, regardless of how many people occupied the area in question. In such a situation, officers often cannot know with complete certainty whether the person they question eventually might turn out to be a suspect, not least because they can never be sure of the accuracy of the victim's description, or whether the person so described has somehow subsequently altered his or her appearance, perhaps by shedding tell-tale clothing.

Pet. App. at 66-67. Yet, if police officers were to receive a description of a fleeing suspect of a certain race in "a defined and limited" area and then were to stop every person of that

race in that area, they would not be stopping persons solely on the basis of race; they also would be relying on location and thus would be doing nothing more than actually relying on a description given to them. And whatever judgment might fairly be left to police officers to disregard easily-altered descriptive information about suspects (like clothing) while searching for a fleeing suspect in such a defined area, it is an entirely different matter to say that police officers who receive a description of a young, black, male are free to target for questioning and examination over a five-day period every black person in an entire city, regardless of gender and regardless of age -- as is alleged in the complaint.

Judge Walker's second concern was that the rule "also would apply to instances where a police officer forgets or confuses part of the description -- whether the perpetrator was wearing a grey jacket or a brown one, for example. In such instances, prudent officers would fear to question anyone at all lest they draw an equal protection lawsuit." Pet. App. at 67. Judge Jacobs expressed a similar concern, contending that the petitioners' position would mean that "when a witness or victim describes a suspect in terms that include race, any deviation by the police from the non-racial descriptive features will be deemed the making of a racial classification subject to strict scrutiny." *Id.* at 75. Yet nothing in the application of the Equal Protection Clause to stops based expressly on race to the exclusion of nonracial information would mean that "any deviation" from a description would warrant heightened constitutional scrutiny. Rather, under the petitioners' view of the Equal Protection Clause, law-enforcement officials would remain free to pursue suspects who generally match descriptions with the normal amount of discretion and

flexibility the courts accord to such investigative activity. What law-enforcement officials would not be free to do is to rely on the fact that a description of an alleged perpetrator included a racial identification to justify targeting for investigation every person of that race in the locality solely because of their race and to the exclusion of nonracial information.

The petitioners have never suggested that law-enforcement officials who receive a description of a suspect that includes racial information must ignore the suspect's race in a subsequent investigation. In that sense, identification cases represent an exception to the general rule that race is an irrelevant and constitutionally impermissible basis for law-enforcement action. But even in the identification context, the Constitution limits the manner in which race can be used by the police. At a minimum, when law-enforcement officials ignore all the nonracial descriptive information provided to them, they transform appropriate description-based action into impermissible race-based action.[5] Contrary to the view of the Court of Appeals, therefore, the Equal Protection Clause is implicated in this case because, as alleged in the complaint, law-enforcement officials in Oneonta ignored all nonracial

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[5]The Court's redistricting jurisprudence has drawn a similar line indicating that race may be a legitimate factor in some circumstances, *see Hunt v. Cromartie*, 69 U.S.L.W. 4234, 4236-37 (Apr. 18, 2001), but may not be "subordinated" by all other considerations in the redistricting process, *see Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Here, the complaint alleges that race obliterated, not merely subordinated, all nonracial identifying characteristics.

elements of the description given them and targeted the city's entire minority population for investigation solely on the basis of their race.

The final, "and perhaps most troubling" concern, according to Judge Walker, was the possibility that the Equal Protection Clause "might be used as a prophylactic device to invalidate the arrest of an actual perpetrator, if that person could successfully argue that when he was first stopped and questioned he imperfectly 'fit' a victim description that included race." Pet. App. at 67. Yet, as discussed above, this case does not raise any issue about the consequences of reliance upon "imperfect" fits. Moreover, this is a civil suit and presents no question about the existence of an exclusionary rule to remedy violations of the Equal Protection Clause.[6]

CONCLUSION

In this case the hundreds of members of the minority community of Oneonta, New York were targeted for criminal investigation for no reason other than the color of their skin. Whatever conclusions might be drawn about the circumstances in which race-based, law-enforcement investigations might meet strict scrutiny, this sweep qualifies as race-based government action that implicates the Fourteenth Amendment.

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[6]Finally, the Court already has recognized that suppression is an appropriate remedy for race-based stops in the Fourth Amendment context. *See Brignoni-Ponce,* 422 U.S. at 887, 876 (affirming judgment of Court of Appeals, which "held that respondent's motion to suppress should have been granted").

The position of the judges of the Court of Appeals to the contrary is an error of sufficient national import -- both in terms of Equal Protection law and the current national controversy concerning the use of race in law-enforcement practices -- to warrant the granting of a writ of *certiorari*.

Respectfully submitted,

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Dated: May 16, 2001
New York, New York

[AMENDED OPINION]
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

(Argued June 4, 1999 Decided Oct. 26, 1999
Amended Aug. 8, 2000)

Docket No. 98-9375

RICKY BROWN, on behalf of himself and all other persons similarly situated; JAMEL CHAMPEN, on behalf of himself and all other persons similarly situated; SHERYL CHAMPEN, on behalf of herself and all other persons similarly situated; HOPETON GORDON, on behalf of himself and all other persons similarly situated; JEAN CANTAVE, on behalf of himself and all other persons similarly situated; RAISHAWN MORRIS, on behalf of himself and all other persons similarly situated; TIM RICHARDSON, on behalf of themselves and all other persons similarly situated; DARRYL TAYLOR, on behalf of themselves and all other persons similarly situated; ROBERT WALKER, on behalf of themselves and all other persons similarly situated; CLEMENT MALLORY, on behalf of themselves and all other persons similarly situated; RONALD SANCHEZ, on behalf of themselves and all other persons similarly situated; DARNELL LEMONS, on behalf of themselves and all other persons similarly situated; JOHN BUTLER, on behalf of themselves and all other persons similarly situated; JASON CHILDS, on behalf of themselves and all other persons similarly situated; PAUL HEYWARD, JR., on behalf of themselves and all other persons similarly

situated; RONALD JENNINGS, on behalf of themselves and all other persons similarly situated; PAUL HOWE, on behalf of themselves and all other persons similarly situated; BUBU DEMASIO, on behalf of themselves and all other persons similarly situated; WILSON ACOSTA, on behalf of themselves and all other persons similarly situated; CHRIS HOLLAND, on behalf of themselves and all other persons similarly situated; JERMAINE ADAMS, on behalf of themselves and all other persons similarly situated; FELIX FRANCIS, on behalf of themselves and all other persons similarly situated; DANIEL SONTAG, on behalf of themselves and all other persons similarly situated; RONALD LYNCH, on behalf of themselves and all other persons similarly situated; KENNETH MCCLAIN, on behalf of themselves and all other persons similarly situated; HERVEY PIERRE, on behalf of themselves and all other persons similarly situated; VINCENT QUINONES, on behalf of themselves and all other persons similarly situated; LAURENCE PLASKETT, on behalf of themselves and all other persons similarly situated; LAMONT WYCHE, on behalf of themselves and all other persons similarly situated; STEVEN YORK, on behalf of themselves and all other persons similarly situated; TYRONE LOHR, on behalf of themselves and all other persons similarly situated; KING GONZALEZ, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

RAISHAWN MORRIS,

Appellant,

CHARLES BATTISTE, on behalf of himself and all other persons similarly situated; WAYNE LEWIS, on behalf of

himself and all other persons similarly situated; MICHAEL CHRISTIAN, on behalf of themselves and all other persons similarly situated; MAJOR BARNETT, on behalf of himself and all other persons similarly situated,

Plaintiffs,

—v.—

CITY OF ONEONTA, NEW YORK; POLICE DEPARTMENT OF THE CITY OF ONEONTA, NEW YORK; JOHN J. DONADIO, Chief of Police of the City of Oneonta, in his individual and official capacities; JOSEPH REDMOND, Oneonta Police Officer, in his individual and official capacities; WILLIAM M. DAVIS, Oneonta Police Officer, in his individual and official capacities; X. OLSEN, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS OFFICERS AND INVESTIGATORS OF THE POLICE DEPARTMENT OF THE CITY OF ONEONTA, in their individual and official capacities; THE STATE OF NEW YORK; STATE UNIVERSITY OF NEW YORK; STATE UNIVERSITY OF NEW YORK, COLLEGE AT ONEONTA ("SUCO"); NEW YORK STATE DIVISION OF STATE POLICE; H. KARL CHANDLER, New York State Police Investigator, in his individual and official capacities; ROBERT FARRAND, New York State Police Troop C Commander, in his individual and official capacities; GEORGE CLUM, New York State Police Investigator, in his individual and official capacities; KEVIN MORE, New York State Police Investigator, in his individual and official capacities; JOHN WAY, New York State Police Investigator, in his official capacities; MARK KIMBALL, New York State Trooper, in his individual and official capacities; KENNETH GRANT, New

York State Trooper, in his individual and official capacities; NEW YORK STATE TROOPER FARRAGO, in his individual and official capacities; ANONYMOUS STATE POLICE OFFICIALS AND INVESTIGATORS, in their individual and official capacities; SUCO DEPARTMENT OF PUBLIC SAFETY; MERRITT HUNT, SUCO Department of Public Safety Officer, in his individual and official capacities; TIM JACKSON, SUCO Department of Public Safety Officer, in his individual and official capacities; JOHN EDMONDSON, SUCO Department of Public Safety Officer, in his individual and official capacities; HARTMARK LEIF, in his individual and official capacities; ERIC WILSON, in his individual and official capacities; CARL SHEDLOCK, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS PUBLIC SAFETY OFFICERS, in their individual and official capacities; ANONYMOUS SUCO COMPUTER EMPLOYEES, in their individual and official capacities; SEAN RALPH, Otsego County Sheriff's Deputy; CHRIS LEHENBAUER, Otsego County Sheriff's Deputy; ANONYMOUS OTSEGO CITY; ANONYMOUS OTSEGO COUNTY SHERIFF'S DEPUTIES, INVESTIGATORS AND/OR OFFICERS,

Defendants-Appellees.

Before:

OAKES and WALKER, Circuit Judges,
and GOLDBERG,* Judge.

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* The Honorable Richard W. Goldberg, of the United States Court of International Trade, sitting by designation.

Appeal from a judgment in the United States District Court for the Northern District of New York (McAvoy, *Chief Judge*), dismissing some claims and granting summary judgment for defendants on other claims arising from plaintiffs' interactions with police authorities during an investigation conducted by the New York State and Oneonta Police Departments based on a victim's description of a suspect that consisted primarily of the suspect's race.

AFFIRMED in part, VACATED in part, and REMANDED.

D. SCOTT BASSINSON, ESQ., Whiteman Osterman & Hanna, Albany, N.Y., *for Plaintiffs-Appellants.*

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DANIEL J. STEWART, ESQ., Dreyer Boyajian LLP, Albany, N.Y., *for City Defendants-Appellees.*

Charles Stephen Ralston, Esq., NAACP Legal Defense and Educational Fund, Inc. (Elaine R. Jones, Director-Counsel, Norman J. Chachkin, David T. Goldberg, Paul K. Sonn, on the brief), New York, N.Y., Arthur N. Eisenberg, New York Civil Liberties Union Foundation, New York, N.Y., and William Goodman, Center for Constitutional Rights, New York, N.Y., *as Amici Curiae in support of Plaintiffs-Appellants.*

James B. Tuttle, Esq., Bohl, Della Rocca & Dorfman, P.C., for the Police Conference of New York, Inc., *Amicus Curiae in support of City Defendants- Appellees.*

JOHN M. WALKER, *Circuit Judge*:

Plaintiffs-appellants, black residents of Oneonta, New York, appeal from the September 9, 1998 judgment of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*). Plaintiffs' claims arise from their interactions with police authorities during an investigation conducted by the New York State and Oneonta Police Departments based on a victim's description of a suspect that consisted primarily of the suspect's race. Plaintiffs asserted claims under 42 U.S.C. § 1983 alleging violations of the Equal Protection Clause and the Fourth Amendment, claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, and other related federal and state causes of action. The district court granted summary judgment for defendants on some of plaintiffs' claims and dismissed others on the pleadings, and the parties stipulated to the discontinuance and dismissal of the remaining claims.

This case bears on the question of the extent to which law enforcement officials may utilize race in their investigation of a crime. We hold that under the circumstances of this case, where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect's race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without violating the Equal Protection Clause. Accordingly, we affirm the dismissal of plaintiffs' §

1983 claims under the Fourteenth Amendment as well as their claims under 42 U.S.C. §§ 1981, 1985(3) and 1986.

Police action is still subject to the constraints of the Fourth Amendment, however, and a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure. In this case, certain individual plaintiffs were subjected to seizures by defendant law enforcement officials, and those individuals may proceed with their claims under the Fourth Amendment.

BACKGROUND

I. *Factual Background*

Oneonta, a small town in upstate New York about sixty miles west of Albany, has about 10,000 full-time residents. In addition, some 7,500 students attend and reside at the State University of New York College at Oneonta ("SUCO"). The people in Oneonta are for the most part white. Fewer than three hundred blacks live in the town, and just two percent of the students at SUCO are black.

On September 4, 1992, shortly before 2:00 a.m., someone broke into a house just outside Oneonta and attacked a seventy-seven-year-old woman. The woman told the police who responded to the scene that she could not identify her assailant's face, but that he was wielding a knife; that he was a black man, based on her view of his hand and forearm; and that he was young, because of the speed with which he crossed her room. She also told the police that, as they struggled, the suspect had cut himself on the hand with the knife. A police

canine unit tracked the assailant's scent from the scene of the crime toward the SUCO campus, but lost the trail after several hundred yards.

The police immediately contacted SUCO and requested a list of its black male students. An official at SUCO supplied the list, and the police attempted to locate and question every black male student at SUCO. This endeavor produced no suspects. Then, over the next several days, the police conducted a "sweep" of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended. Those persons whose names appeared on the SUCO list and those who were approached and questioned by the police, believing that they had been unlawfully singled out because of their race, decided to seek redress.

II. *Procedural History*

In early 1993, the SUCO students whose names appeared on the list and other persons questioned during the sweep of Oneonta filed this action in the district court against the City of Oneonta, the State of New York, SUCO, certain SUCO officials, and various police departments and police officers.[1] Plaintiffs sought certification of two plaintiff classes

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[1] Specifically, the complaint named: the New York State Police, and State Police Officers Chandler, Farrand, Clum, More, Way, Kimball, Grant, and Farrago; the SUCO Department of Public Safety, and its Officers

(continued...)

consisting of the 78 students on the list as Class I, and those persons, whether students or not, stopped and questioned by the police as Class II.

In their amended complaint, plaintiffs asserted, under 42 U.S.C. § 1983, that defendants violated their rights under the Fourth Amendment and the Equal Protection Clause of the United States Constitution by questioning the black SUCO students and by conducting the sweep of Oneonta. Plaintiffs also alleged related claims under 42 U.S.C. §§ 1981, 1985(3) & 1986, and under Title VI, 42 U.S.C. § 2000d, and asserted various state law claims. Plaintiffs whose names appeared on the list also asserted claims under §§ 1983, 1985(3) and 1986 alleging that certain defendants had violated their rights under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, by releasing the list to the police.

Both sides moved for summary judgment, and defendants moved to dismiss certain claims on the pleadings. On December 13, 1993, ruling from the bench, the district court certified Class I, but refused to certify Class II on the ground that each individual had experienced a separate and factually distinct encounter with the police. As there are no remaining claims arising from the release of the student list, Class I is of

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[1](...continued)
Hunt, Jackson, and Edmondson; the Oneonta Police Department, and its Officers Donadio, Shedlock, Redmond, Olsen, and Davis; and anonymous officials of all three departments.

no continuing significance in the case.[2] The plaintiffs seeking Class II certification, however, proceeded individually.

The district court dismissed one plaintiff's Fourth Amendment claim (because that plaintiff had not detailed the circumstances of his contact with law enforcement) and granted summary judgment for defendants on the remaining Fourth Amendment claims on the ground that the police encounters during the sweep were not seizures. The district court dismissed the equal protection claims, with leave to replead, on the ground that plaintiffs had not properly pleaded the existence of "a similarly-situated group of non-minority individuals [that] were treated differently by law enforcement officers during the investigation of a crime." The district court granted defendants' motion to dismiss the § 1985(3) and § 1986 claims insofar as they were based on the Fourth Amendment, the Equal Protection Clause, or state law, but denied the motion to dismiss plaintiffs' claims under § 1981 and Title VI. The court dismissed some state law claims and allowed others to continue. In addition, the district court granted summary judgment on all claims in favor of defendants Redmond and Olsen, Oneonta police officers who had submitted unchallenged affidavits stating that they had not participated in

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[2] On interlocutory appeal, a panel of this court held that the SUCO officials were entitled to qualified immunity from all claims arising from the release of the list. *See* Brown v. City of Oneonta, 106 F.3d 1125 (2d Cir.1997). Accordingly, those claims are no longer part of this case.

any of the events giving rise to the complaint.[3]

Both sides moved for reconsideration of various portions of the district court's ruling, and on July 18, 1994, the district court filed a second opinion. The district court granted defendants' motion to reconsider its ruling on the § 1981 claims, and dismissed those claims with leave to replead. As with the equal protection claims, the district court held that § 1981 claims "require a showing of specific instances ... where the plaintiffs were singled out for unlawful oppression in contrast to others similarly situated."

Plaintiffs filed a second amended complaint on January 30, 1995. This complaint added twenty-seven new plaintiffs and several new defendants[4] and repleaded the federal claims that the district court had dismissed. Defendants again moved to dismiss and for summary judgment, and on January 3, 1996, the district court filed its next opinion. As to the newly added Fourth Amendment claims, the district court dismissed them or granted summary judgment for defendants on every claim except those of plaintiffs Jennings, Quinones, and Plaskett. The district court granted summary judgment on all of the new Fourth Amendment claims in favor of defendants Chandler,

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[3] Plaintiffs do not contest on appeal the district court's grant of summary judgment in favor of Redmond and Olsen.

[4] The second amended complaint added defendants Ralph and Lehenbauer, Deputies of the Otsego County Sheriff's Office, as well as other anonymous Otsego County officers.

Farrand, More, Way, Kimball, Grant, and Farrago, all of whom are State Police Officers who had submitted unopposed affidavits indicating that they had had no contact with plaintiffs.[5] The district court again rejected the equal protection claims on the ground that plaintiffs had failed to "allege that a similarly situated group of non-minority individuals was treated differently." It dismissed plaintiffs' § 1981 claims for the same reason, denied summary judgment on plaintiffs' § 1983 claims against the City of Oneonta, and granted summary judgment for all defendants on the §§ 1985(3) and 1986 claims.[6]

Following the decisions of the district court, the parties entered into several stipulations with a view to securing an appealable final judgment. On September 8, 1997, Quinones discontinued his claims against Oneonta Police Officers Donadio, Davis, and Shedlock. All of the plaintiffs except Michael Christian then stipulated to (1) the discontinuance with

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[5] Plaintiffs do not appeal the district court's ruling with respect to these defendants.

[6] Another motion for reconsideration produced yet a fourth order by the district court, filed on February 20, 1996. This order did not materially alter the district court's holdings with regard to the substantive issues in the case, but the district court did dismiss the Fourth Amendment claims against SUCO defendants Wilson, Jackson, and Hunt and against State Police defendant Clum on the basis of affidavits stating their lack of personal involvement with any of the plaintiffs. Plaintiffs do not contest the district court's ruling with respect to these defendants.

prejudice of all of the federal claims that the district court had not yet determined in favor of defendants;[7] and (2) the dismissal of all of the supplemental state law claims without prejudice, but with an agreement not to reinstate those claims in the Northern District of New York. Christian's action was dismissed for failure to prosecute by an order filed on August 13, 1998, and final judgment was entered on September 9, 1998.

The plaintiffs appealed and we issued an opinion on October 26, 1999, affirming the denial of plaintiffs' equal protection challenge, while vacating summary judgment as to certain plaintiffs' Fourth Amendment claims and remanding for further proceedings. *See Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir.1999). On December 17, 1999, plaintiffs filed a petition for rehearing and for rehearing in banc. The panel subsequently decided on changes to the opinion. In addition to modifying the text of the original opinion in certain respects, this amended opinion, while adhering to the result originally reached on the equal protection claim, changes the result, and thereby grants rehearing, as to certain plaintiffs' Fourth Amendment claims. Upon the filing of this amended opinion, the original opinion is vacated.

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[7] These included plaintiffs' § 1983 *Monell* claims against the City of Oneonta, and the Fourth Amendment claims of plaintiffs Jennings, Quinones, and Plaskett.

DISCUSSION

On appeal, plaintiffs raise several contentions of error: first, that the district court improperly dismissed their § 1983 claims under the Equal Protection Clause using an incorrect pleading standard; second, that the district court made the same error in dismissing their § 1981 claims; third, that the district court erroneously dismissed or granted summary judgment against plaintiffs on their § 1983 claims under the Fourth Amendment; and finally, that the district court improperly dismissed their "derivative" claims under §§ 1985(3) and 1986. We affirm the dismissal of plaintiffs' equal protection and § 1981 claims, but we reverse in part the district court's rulings on plaintiffs' claims under the Fourth Amendment. We will discuss the particulars of each of plaintiffs' claims in turn.

I. *Equal Protection Claims*

The Fourteenth Amendment to the United States Constitution declares that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To state a race-based claim under the Equal Protection Clause, a plaintiff must allege that a government actor intentionally discriminated against him on the basis of his race. *See Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir.1999).

There are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause. A plaintiff could point to a law or policy that "expressly classifies persons on the basis of race." *Id.* (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227-29, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). Or, a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). A plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Johnson v. Wing*, 178 F.3d 611, 615 (2d Cir.1999).

Plaintiffs seek to plead an equal protection violation by the first method enumerated above. They contend that defendants utilized an express racial classification by stopping and questioning plaintiffs solely on the basis of their race. Plaintiffs assert that the district court erred in requiring them to plead the existence of a similarly situated group of non-minority individuals that were treated differently in the investigation of a crime.

When pleading a violation of the Equal Protection Clause, it is sometimes necessary to allege the existence of a similarly situated group that was treated differently. For example, if a plaintiff seeks to prove selective prosecution on the basis of his race, he "must show that similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465, 116 S.Ct. 1480, 134

L.Ed.2d 687 (1996).

Plaintiffs are correct, however, that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict judicial scrutiny, *see Able v. United States*, 155 F.3d 628, 631-32 (2d Cir.1998), and strict scrutiny analysis in effect addresses the question of whether people of different races are similarly situated with regard to the law or policy at issue. This does not avail plaintiffs in this case, however, because they have not identified any law or policy that contains an express racial classification.

Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black. Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black Oneonta residents be questioned whenever a violent crime is reported. In short, plaintiffs' factual premise is not supported by the pleadings: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race- neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault--a description that included race as one of several

elements--defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found.

Plaintiffs cite to cases holding that initiating an investigation of a person based solely upon that person's race violates the Equal Protection Clause. In *United States v. Avery*, 137 F.3d 343 (6th Cir.1997), the defendant claimed that he was stopped by law enforcement solely on the basis of his race. While the court affirmed his conviction, citing other factors utilized by the police in choosing to follow the defendant, the court stated that "[i]f law enforcement ... takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred." *Id.* at 355; *see also United States v. Scopo*, 19 F.3d 777, 786 (2d Cir.1994) (Newman, J., concurring) (speculating that while pretextual traffic stops based on probable cause are not Fourth Amendment violations, their selective use based on race could violate the Equal Protection clause). Here, the police were not routinely patrolling an airport for possible drug smuggling, as in *Avery*.[8]

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[8] The court's opinion in Avery also contained dicta to the effect that even if the police receive a "tip" consisting solely of a persons's race, "and the officers pursue investigations of everyone of that race, their action may be found constitutionally impermissible." 137 F.3d at 354 n. 5; *but cf. Buffkins v. City of Omaha*, 922 F.2d 465, 468 (8th Cir.1990) (holding that detention of black woman at an

(continued...)

Instead, it is alleged that they were searching for a particular perpetrator of a violent assault, relying in their search on the victim's description of the perpetrator as a young black man with a cut on his hand. As the police therefore are not alleged to have investigated "based solely upon ... race, without more," id., plaintiffs have failed to state an actionable claim under the Equal Protection Clause.

Police practices that mirror defendants' behavior in this case--attempting to question every person fitting a general description--may well have a disparate impact on small minority groups in towns such as Oneonta. If there are few black residents who fit the general description, for example, it would be more useful for the police to use race to find a black suspect than a white one. It may also be practicable for law enforcement to attempt to contact every black person who was

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[8](...continued)
airport did not amount to racial discrimination under § 1981 because "her race matched the racial description of the person described in the tip"). We do not know if the "tip" contemplated by the *Avery* court is similar to a victim's description of an assailant; as the *Avery* court itself pointed out in somewhat contradictory fashion, where there is a tip from an outside source, "the officers obviously cannot control the race of the person they investigate and ultimately contact. Hence, their selection of that person as a target of investigation does not amount to an equal protection violation." 137 F.3d at 354 n. 5. In any event, this non-binding dicta from a non-binding circuit court does not persuade us that the police action in this case violated the Equal Protection Clause.

a young male, but quite impossible to contact every such white person. If a community were primarily black with very few white residents and the search were for a young white male, the impact would be reversed. The Equal Protection Clause, however, has long been interpreted to extend to governmental action that has a disparate impact on a minority group only when that action was undertaken with discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 239-41, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Without additional evidence of discriminatory animus, the disparate impact of an investigation such as the one in this case is insufficient to sustain an equal protection claim.

In this case, plaintiffs do not sufficiently allege discriminatory intent. They do allege that at least one woman, Sheryl Champen, was stopped by law enforcement officials during their sweep of Oneonta. This allegation is significant because it may indicate that defendants considered race more strongly than other parts of the victim's description. However, this single incident, to the extent that it was related to the investigation, is not sufficient in our view to support an equal protection claim under the circumstances of this case.

We are not blind to the sense of frustration that was doubtlessly felt by those questioned by the police during this investigation. The actions of the police were understandably upsetting to the innocent plaintiffs who were stopped to see if they fit the victim's description of the suspect. The plaintiffs have argued that there is little difference between what occurred here and unlawful profiling based on a racial stereotype. While we disagree as a matter of law and believe that the conduct of the police in the circumstances presented

here did not constitute a violation of the equal protection rights of the plaintiffs, we do not establish any rule that would govern circumstances giving rise to liability that are not present in this case. Any such rule will have to wait for the appropriate case. Nor do we hold that under no circumstances may the police, when acting on a description of a suspect, violate the equal protection rights of non-suspects, whether or not the police only stop persons conforming to the description of the suspect given by the victim.

We are also not unmindful of the impact of this police action on community relations. Law enforcement officials should always be cognizant of the impressions they leave on a community, lest distrust of law enforcement undermine its effectiveness. *Cf.* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 Colum. Hum. Rts. L.Rev. 551, 552 (1997) (describing the impact on the community of race-based pretextual traffic stops). Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause. We hold that it did not, and therefore affirm the district court's dismissal of plaintiffs' § 1983 claims alleging equal protection violations.[9]

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[9] To the extent that this opinion clarifies equal protection law, the district court is free on remand to entertain a motion to replead. We express no opinion on the merits of any such motion.

II. *Section 1981 Claims*

To establish a claim under 42 U.S.C. § 1981, plaintiffs must allege facts supporting the following elements: (1) plaintiffs are members of a racial minority; (2) defendants' intent to discriminate on the basis of race; and (3) discrimination concerning one of the statute's enumerated activities. *See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993) (per curiam). Those enumerated activities include the rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a).

Plaintiffs' claims under 42 U.S.C. § 1981 suffer from the same shortcomings as their equal protection claims. Section 1981, like the Equal Protection Clause, only prohibits intentional racial discrimination. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982); *see also Albert v. Carovano*, 851 F.2d 561, 573 (2d Cir.1988) (holding that to plead a § 1981 claim alleging selective enforcement, plaintiff must allege instances in which "similarly situated" non-minorities were treated differently). Accordingly, plaintiffs must meet the same pleading standard for their § 1981 claims as for their § 1983 claims under the Equal Protection Clause, and these claims were insufficiently pleaded for the reasons stated above. We therefore affirm the dismissal of plaintiffs' § 1981 claims.

III. *Fourth Amendment Claims*

Plaintiffs' § 1983 claims also allege a violation of their Fourth Amendment rights during defendants' sweep of Oneonta. The district court dismissed many of these claims and granted summary judgment for defendants on other claims because, in its view, plaintiffs had not been subject to "seizures" under the Fourth Amendment.[10] For the reasons that follow, we vacate the summary judgment against plaintiffs Jamel Champen, Jean Cantave, Ricky Brown, and Sheryl Champen, and affirm the district court's dismissal or grant of summary judgment with regard to the remaining claims.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Supreme Court established that the Fourth Amendment does not prohibit the police from stopping a person for questioning when the police have a reasonable suspicion that a person may be armed and dangerous, even when that suspicion does not amount to the probable cause necessary to make an arrest. *See id.* at 24-27, 88 S.Ct. 1868; *United States v. Jaramillo*, 25 F.3d 1146, 1150-51 (2d Cir.1994). Defendants would have difficulty demonstrating reasonable suspicion in this case, and indeed, they do not attempt to do so. Defendants instead argue that the district

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[10] The district court denied defendants' motions to dismiss or for summary judgment with respect to the Fourth Amendment claims of plaintiffs Jennings, Quinones and Plaskett. These plaintiffs later discontinued their Fourth Amendment actions by stipulation, and so their claims are no longer part of the case.

court correctly determined that no reasonable suspicion was necessary, because no seizure--not even a *Terry* stop --occurred in this case.

To prevail on a § 1983 claim under the Fourth Amendment based on an allegedly unlawful *Terry* stop, a plaintiff first must prove that he was seized. "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). However, a seizure does occur when, "by means of physical force or show of authority," *United States v. Hooper*, 935 F.2d 484, 491 (2d Cir.1991) (quoting *Terry*, 392 U.S. at 19 n. 16, 88 S.Ct. 1868), a police officer detains a person such that "a reasonable person would have believed that he was not free to leave," id. (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). Pertinent factors identifying a police seizure can include

> the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room.

Hooper, 935 F.2d at 491 (quoting *United States v. Lee*, 916 F.2d 814, 819 (2d Cir.1990)). Whether a seizure occurred is a question of law to be reviewed *de novo*, while the factual

findings underlying that determination are reviewed for clear error. *See, e.g., United States v. Peterson*, 100 F.3d 7, 11 (2d Cir.1996); *United States v. Tehrani*, 49 F.3d 54, 58 (2d Cir.1995)

Jamel Champen, in his affidavit, alleges that a police officer pointed a spotlight at him and said "What, are you stupid? Come here. I want to talk to you." He was then told to show his hands. While it is arguably a close case, we conclude that a reasonable person in Champen's circumstances would have considered the police officer's request to be compulsory. Accordingly, we hold that Champen was seized and vacate the summary judgment for defendants on his Fourth Amendment claim.

Jean Cantave avers that he was driving in Oneonta when he was pulled over by a police car with a siren and flashing lights. Cantave was ordered out of the car and instructed to place his hands on top of the car. The Supreme Court has stated that the "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' " under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Under *Whren*, we have no doubt that Cantave was seized, and accordingly we vacate the summary judgment for defendants on Cantave's claim.

Ricky Brown's affidavit states that three police officers stopped him on the street. The police officers questioned him about whether he was a student and where he had been. They asked for his identification card, passed it around, and returned

it to Brown. At one point, the officers "formed a circle around" Brown. When Brown asked if he had permission to leave, they told him that he was free to go. When Brown started to leave, however, one officer told him to come back and asked to see his hands. We conclude that a reasonable person in Brown's position--directed to return by one of the police officers who, just moments before, had encircled him--would not have felt free to leave. We therefore vacate the district court's grant of summary judgment on Brown's claim.

Sheryl Champen alleges that a police officer approached her at a bus station and told her that if she wanted to board the bus for which she was waiting, she would have to produce some identification. This contact is plainly a seizure under the caselaw because the police officer made it clear that he was detaining her. Accordingly, we vacate the summary judgment for defendants on Sheryl Champen's claim.

Raishawn Morris alleges that he encountered two police officers in his dorm lobby, and that they asked him to show them his hands. This does not rise to the level of a seizure, and we affirm the summary judgment for defendants on Morris's claim.

Finally, we also affirm the district court's dismissal of the remaining Fourth Amendment claims. The other plaintiffs did not submit any affidavits describing the details of their contacts with defendants, and the complaint fails to allege facts stating a claim that they were seized by defendants. *See Sheppard v. Beerman*, 18 F.3d 147, 153 (2d Cir.1994).

IV. *Claims Under §§ 1985(3) & 1986*

Plaintiffs also asserted causes of action under 42 U.S.C. §§ 1985(3) and 1986. The elements of a claim under § 1985(3) are: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, ...; (3) an act in furtherance of the conspiracy; (4) whereby a person is ... deprived of any right of a citizen of the United States." *Mian*, 7 F.3d at 1087. The conspiracy must be motivated by racial animus. *See id.* at 1088. Because a claim under § 1985(3) requires proof of discriminatory racial animus, we affirm the district court's dismissal of plaintiffs' § 1985(3) claims for the same reasons that we dismissed plaintiffs' equal protection and § 1981 claims, discussed in detail above. And because "a § 1986 claim must be predicated on a valid § 1985 claim," *id.*, plaintiffs' § 1986 claim was properly dismissed as well.

CONCLUSION

We affirm the dismissal of plaintiffs' § 1983 claims under the Equal Protection Clause. We also affirm the dismissal of plaintiffs' claims under §§ 1981, 1985(3) and 1986. With regard to the plaintiffs' § 1983 claims under the Fourth Amendment, we affirm the district court's dismissal of these claims except those of plaintiffs Jamel Champen, Jean Cantave, Ricky Brown and Sheryl Champen. We vacate the district court's grant of summary judgment on those claims, and remand the case to the district court for further proceedings. Jamel Champen, Jean Cantave, Ricky Brown, and Sheryl Champen may continue to litigate their § 1983 claims of Fourth Amendment violations against all law enforcement defendants

except Redmond and Olsen, against whom their claims were previously dismissed.

Affirmed in part, vacated in part, and remanded. Each party shall bear its own costs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

(Argued June 4, 1999 Decided Oct. 26, 1999)

Docket No. 98-9375

RICKY BROWN, on behalf of himself and all other persons similarly situated; JAMEL CHAMPEN, on behalf of himself and all other persons similarly situated; SHERYL CHAMPEN, on behalf of herself and all other persons similarly situated; HOPETON GORDON, on behalf of himself and all other persons similarly situated; JEAN CANTAVE, on behalf of himself and all other persons similarly situated; RAISHAWN MORRIS, on behalf of himself and all other persons similarly situated; TIM RICHARDSON, on behalf of themselves and all other persons similarly situated; DARRYL TAYLOR, on behalf of themselves and all other persons similarly situated; ROBERT WALKER, on behalf of themselves and all other persons similarly situated; CLEMENT MALLORY, on behalf of themselves and all other persons similarly situated; RONALD SANCHEZ, on behalf of themselves and all other persons similarly situated; DARNELL LEMONS, on behalf of themselves and all other persons similarly situated; JOHN BUTLER, on behalf of themselves and all other persons similarly situated; JASON CHILDS, on behalf of themselves and all other persons similarly situated; PAUL HEYWARD, JR., on behalf of themselves and all other persons similarly situated; RONALD JENNINGS, on behalf of themselves and all other persons similarly situated; PAUL HOWE, on behalf of

themselves and all other persons similarly situated; BUBU DEMASIO, on behalf of themselves and all other persons similarly situated; WILSON ACOSTA, on behalf of themselves and all other persons similarly situated; CHRIS HOLLAND, on behalf of themselves and all other persons similarly situated; JERMAINE ADAMS, on behalf of themselves and all other persons similarly situated; FELIX FRANCIS, on behalf of themselves and all other persons similarly situated; DANIEL SONTAG, on behalf of themselves and all other persons similarly situated; RONALD LYNCH, on behalf of themselves and all other persons similarly situated; KENNETH MCCLAIN, on behalf of themselves and all other persons similarly situated; HERVEY PIERRE, on behalf of themselves and all other persons similarly situated; VINCENT QUINONES, on behalf of themselves and all other persons similarly situated; LAURENCE PLASKETT, on behalf of themselves and all other persons similarly situated; LAMONT WYCHE, on behalf of themselves and all other persons similarly situated; STEVEN YORK, on behalf of themselves and all other persons similarly situated; TYRONE LOHR, on behalf of themselves and all other persons similarly situated; KING GONZALEZ, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

RAISHAWN MORRIS,

Appellant,

CHARLES BATTISTE, on behalf of himself and all other persons similarly situated; WAYNE LEWIS, on behalf of himself and all other persons similarly situated; MICHAEL CHRISTIAN, on behalf of themselves and all other persons

similarly situated; MAJOR BARNETT, on behalf of himself and all other persons similarly situated,

Plaintiffs,

—v.—

CITY OF ONEONTA, NEW YORK; POLICE DEPARTMENT OF THE CITY OF ONEONTA, NEW YORK; JOHN J. DONADIO, Chief of Police of the City of Oneonta, in his individual and official capacities; JOSEPH REDMOND, Oneonta Police Officer, in his individual and official capacities; WILLIAM M. DAVIS, Oneonta Police Officer, in his individual and official capacities; X. OLSEN, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS OFFICERS AND INVESTIGATORS OF THE POLICE DEPARTMENT OF THE CITY OF ONEONTA, in their individual and official capacities; THE STATE OF NEW YORK; STATE UNIVERSITY OF NEW YORK; STATE UNIVERSITY OF NEW YORK, COLLEGE AT ONEONTA ("SUCO"); NEW YORK STATE DIVISION OF STATE POLICE; H. KARL CHANDLER, New York State Police Investigator, in his individual and official capacities; ROBERT FARRAND, New York State Police Troop C Commander, in his individual and official capacities; GEORGE CLUM, New York State Police Investigator, in his individual and official capacities; KEVIN MORE, New York State Police Investigator, in his individual and official capacities; JOHN WAY, New York State Police Investigator, in his official capacities; MARK KIMBALL, New York State Trooper, in his individual and official capacities; KENNETH GRANT, New York State Trooper, in his individual and official capacities; NEW YORK STATE TROOPER FARRAGO, in his individual and official capacities; ANONYMOUS STATE POLICE

OFFICIALS AND INVESTIGATORS, in their individual and official capacities; SUCO DEPARTMENT OF PUBLIC SAFETY; MERRITT HUNT, SUCO Department of Public Safety Officer, in his individual and official capacities; TIM JACKSON, SUCO Department of Public Safety Officer, in his individual and official capacities; JOHN EDMONDSON, SUCO Department of Public Safety Officer, in his individual and official capacities; HARTMARK LEIF, in his individual and official capacities; ERIC WILSON, in his individual and official capacities; CARL SHEDLOCK, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS PUBLIC SAFETY OFFICERS, in their individual and official capacities; ANONYMOUS SUCO COMPUTER EMPLOYEES, in their individual and official capacities; SEAN RALPH, Otsego County Sheriff's Deputy; CHRIS LEHENBAUER, Otsego County Sheriff's Deputy; ANONYMOUS OTSEGO CITY; ANONYMOUS OTSEGO COUNTY SHERIFF'S DEPUTIES, INVESTIGATORS AND/OR OFFICERS,

Defendants-Appellees.

Before:

OAKES and WALKER, *Circuit Judges*,
and GOLDBERG,* *Judge*.

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* The Honorable Richard W. Goldberg, of the United States Court of International Trade, sitting by designation.

Appeal from a judgment in the United States District Court for the Northern District of New York (McAvoy, *Chief Judge*), dismissing some claims and granting summary judgment for defendants on other claims arising from plaintiffs' interactions with police authorities during an investigation conducted by the New York State and Oneonta Police Departments based on a victim's description of a suspect that consisted primarily of the suspect's race.

AFFIRMED in part, VACATED in part, and REMANDED.

D. SCOTT BASSINSON, ESQ., Whiteman Osterman & Hanna, Albany, N.Y., *for Plaintiffs-Appellants*.

DENISE A. HARTMAN, Assistant Attorney General (Eliot Spitzer, Attorney General of the State of New York, Peter H. Schiff, Acting Solicitor General, Nancy A. Spiegel, Assistant Attorney General, *of counsel*), Albany, N.Y., *for State Defendants-Appellees*.

DANIEL J. STEWART, Dreyer Boyajian LLP, Albany, N.Y., *for City Defendants- Appellees*.

Charles Stephen Ralston, NAACP Legal Defense and Educational Fund, Inc. (Elaine R. Jones, Director-Counsel, Norman J. Chachkin, David T. Goldberg, Paul K. Sonn, *on the brief*), New York, N.Y., Arthur N. Eisenberg, New York Civil Liberties Union Foundation, New York, N.Y., and William Goodman, Center for Constitutional Rights, New York, N.Y., *as Amici Curiae in support of Plaintiffs-Appellants*.

James B. Tuttle, Esq., Bohl, Della Rocca & Dorfman, P.C., *for the Police Conference of New York, Inc., Amicus Curiae in support of City Defendants- Appellees.*

WALKER, *Circuit Judge*:

Plaintiffs-appellants, black residents of Oneonta, New York, appeal from the September 9, 1998 judgment of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*). Plaintiffs' claims arise from their interactions with police authorities during an investigation conducted by the New York State and Oneonta Police Departments based on a victim's description of a suspect that consisted primarily of the suspect's race. Plaintiffs asserted claims under 42 U.S.C. § 1983 alleging violations of the Equal Protection Clause and the Fourth Amendment, claims under 42 U.S.C. §§ 1981, 1985(3) and 1986, and other related federal and state causes of action. The district court granted summary judgment for defendants on some of plaintiffs' claims and dismissed others on the pleadings, and the parties stipulated to the discontinuance and dismissal of the remaining claims.

This case bears on the question of the extent to which law enforcement officials may utilize race in their investigation of a crime. We hold that under the circumstances of this case, where law enforcement officials possessed a description of a criminal suspect, even though that description consisted primarily of the suspect's race and gender, absent other evidence of discriminatory racial animus, they could act on the basis of that description without violating the Equal Protection

Clause. Accordingly, we affirm the dismissal of plaintiffs' § 1983 claims under the Fourteenth Amendment as well as their claims under 42 U.S.C. §§ 1981, 1985(3) and 1986.

Police action is still subject to the constraints of the Fourth Amendment, however, and a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure. In this case, certain individual plaintiffs were subjected to seizures by defendant law enforcement officials, and those individuals may proceed with their claims under the Fourth Amendment.

BACKGROUND

I. *Factual Background*

Oneonta, a small town in upstate New York about sixty miles west of Albany, has about 10,000 full-time residents. In addition, some 7,500 students attend and reside at the State University of New York College at Oneonta ("SUCO"). The people in Oneonta are for the most part white. Fewer than three hundred blacks live in the town, and just two percent of the students at SUCO are black.

On September 4, 1992, shortly before 2:00 a.m., someone broke into a house just outside Oneonta and attacked a seventy-seven-year-old woman. The woman told the police who responded to the scene that she could not identify her assailant's face, but that he was wielding a knife; that he was a black man, based on her view of his hand and forearm; and that he was young, because of the speed with which he crossed her room. She also told the police that, as they struggled, the

suspect had cut himself on the hand with the knife. A police canine unit tracked the assailant's scent from the scene of the crime toward the SUCO campus, but lost the trail after several hundred yards.

The police immediately contacted SUCO and requested a list of its black male students. An official at SUCO supplied the list, and the police attempted to locate and question every black male student at SUCO. This endeavor produced no suspects. Then, over the next several days, the police conducted a "sweep" of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended. Those persons whose names appeared on the SUCO list and those who were approached and questioned by the police, believing that they had been unlawfully singled out because of their race, decided to seek redress.

II. *Procedural History*

In early 1993, the SUCO students whose names appeared on the list and other persons questioned during the sweep of Oneonta filed this action in the district court against the City of Oneonta, the State of New York, SUCO, certain SUCO officials, and various police departments and police officers.[1] Plaintiffs sought certification of two plaintiff classes

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[1] Specifically, the complaint named: the New York State Police, and State Police Officers Chandler, Farrand, Clum, More, Way, Kimball, Grant, and Farrago; the (continued...)

consisting of the 78 students on the list as Class I, and those persons, whether students or not, stopped and questioned by the police as Class II.

In their amended complaint, plaintiffs asserted, under 42 U.S.C. § 1983, that defendants violated their rights under the Fourth Amendment and the Equal Protection Clause of the United States Constitution by questioning the black SUCO students and by conducting the sweep of Oneonta. Plaintiffs also alleged related claims under 42 U.S.C. §§ 1981, 1985(3) & 1986, and under Title VI, 42 U.S.C. § 2000d, and asserted various state law claims. Plaintiffs whose names appeared on the list also asserted claims under §§ 1983, 1985(3) and 1986 alleging that certain defendants had violated their rights under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, by releasing the list to the police.

Both sides moved for summary judgment, and defendants moved to dismiss certain claims on the pleadings. On December 13, 1993, ruling from the bench, the district court certified Class I, but refused to certify Class II on the ground that each individual had experienced a separate and factually distinct encounter with the police. As there are no remaining claims arising from the release of the student list,

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(...continued)
SUCO Department of Public Safety, and its Officers Hunt, Jackson, and Edmondson; the Oneonta Police Department, and its Officers Donadio, Shedlock, Redmond, Olsen, and Davis; and anonymous officials of all three departments.

Class I is of no continuing significance in the case.[2] The plaintiffs seeking Class II certification, however, proceeded individually.

The district court dismissed one plaintiff's Fourth Amendment claim (because that plaintiff had not detailed the circumstances of his contact with law enforcement) and granted summary judgment for defendants on the remaining Fourth Amendment claims on the ground that the police encounters during the sweep were not seizures. The district court dismissed the equal protection claims, with leave to replead, on the ground that plaintiffs had not properly pleaded the existence of "a similarly-situated group of non-minority individuals [that] were treated differently by law enforcement officers during the investigation of a crime." The district court granted defendants' motion to dismiss the § 1985(3) and § 1986 claims insofar as they were based on the Fourth Amendment, the Equal Protection Clause, or state law, but denied the motion to dismiss plaintiffs' claims under § 1981 and Title VI. The court dismissed some state law claims and allowed others to continue. In addition, the district court granted summary judgment on all claims in favor of defendants Redmond and Olsen, Oneonta police officers who had submitted unchallenged affidavits stating that they had not participated in

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[2] On interlocutory appeal, a panel of this court held that the SUCO officials were entitled to qualified immunity from all claims arising from the release of the list. *See* Brown v. City of Oneonta, 106 F.3d 1125 (2d Cir.1997). Accordingly, those claims are no longer part of this case.

any of the events giving rise to the complaint.[3]

Both sides moved for reconsideration of various portions of the district court's ruling, and on July 18, 1994, the district court filed a second opinion. The district court granted defendants' motion to reconsider its ruling on the § 1981 claims, and dismissed those claims with leave to replead. As with the equal protection claims, the district court held that § 1981 claims "require a showing of specific instances ... where the plaintiffs were singled out for unlawful oppression in contrast to others similarly situated."

Plaintiffs filed a second amended complaint on January 30, 1995. This complaint added twenty-seven new plaintiffs and several new defendants[4] and repleaded the federal claims that the district court had dismissed. Defendants again moved to dismiss and for summary judgment, and on January 3, 1996, the district court filed its next opinion. As to the newly added Fourth Amendment claims, the district court dismissed them or granted summary judgment for defendants on every claim except those of plaintiffs Jennings, Quinones, and Plaskett. The district court granted summary judgment on all of the new Fourth Amendment claims in favor of defendants Chandler,

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[3] Plaintiffs do not contest on appeal the district court's grant of summary judgment in favor of Redmond and Olsen.

[4] The second amended complaint added defendants Ralph and Lehenbauer, Deputies of the Otsego County Sheriff's Office, as well as other anonymous Otsego County officers.

Farrand, More, Way, Kimball, Grant, and Farrago, all of whom are State Police Officers who had submitted unopposed affidavits indicating that they had had no contact with plaintiffs.[5] The district court again rejected the equal protection claims on the ground that plaintiffs had failed to "allege that a similarly situated group of non-minority individuals was treated differently." It dismissed plaintiffs' § 1981 claims for the same reason, denied summary judgment on plaintiffs' § 1983 claims against the City of Oneonta, and granted summary judgment for all defendants on the §§ 1985(3) and 1986 claims.[6]

Following the decisions of the district court, the parties entered into several stipulations with a view to securing an appealable final judgment. On September 8, 1997, Quinones discontinued his claims against Oneonta Police Officers Donadio, Davis, and Shedlock. All of the plaintiffs except Michael Christian then stipulated to (1) the discontinuance with prejudice of all of the federal claims that the district court had

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[5] Plaintiffs do not appeal the district court's ruling with respect to these defendants.

[6] Another motion for reconsideration produced yet a fourth order by the district court, filed on February 20, 1996. This order did not materially alter the district court's holdings with regard to the substantive issues in the case, but the district court did dismiss the Fourth Amendment claims against SUCO defendants Wilson, Jackson, and Hunt and against State Police defendant Clum on the basis of affidavits stating their lack of personal involvement with any of the plaintiffs. Plaintiffs do not contest the district court's ruling with respect to these defendants.

not yet determined in favor of defendants;[7] and (2) the dismissal of all of the supplemental state law claims without prejudice, but with an agreement not to reinstate those claims in the Northern District of New York. Christian's action was dismissed for failure to prosecute by an order filed on August 13, 1998, and final judgment was entered on September 9, 1998. This appeal followed.

DISCUSSION

On appeal, plaintiffs raise several contentions of error: first, that the district court improperly dismissed their § 1983 claims under the Equal Protection Clause using an incorrect pleading standard; second, that the district court made the same error in dismissing their § 1981 claims; third, that the district court erroneously dismissed or granted summary judgment against plaintiffs on their § 1983 claims under the Fourth Amendment; and finally, that the district court improperly dismissed their "derivative" claims under §§ 1985(3) and 1986. We affirm the dismissal of plaintiffs' equal protection and § 1981 claims, but we reverse in part the district court's rulings on plaintiffs' claims under the Fourth Amendment. We will discuss the particulars of each of plaintiffs' claims in turn.

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[7] These included plaintiffs' § 1983 *Monell* claims against the City of Oneonta, and the Fourth Amendment claims of plaintiffs Jennings, Quinones, and Plaskett.

I. *Equal Protection Claims*

The Fourteenth Amendment to the United States Constitution declares that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). To state a race-based claim under the Equal Protection Clause, a plaintiff must allege that a government actor intentionally discriminated against him on the basis of his race. *See Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir.1999).

There are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause. A plaintiff could point to a law or policy that "expressly classifies persons on the basis of race." Id. (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227-29, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). Or, a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). A plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Johnson v. Wing*, 178 F.3d 611, 615 (2d Cir.1999).

Plaintiffs seek to plead an equal protection violation by

the first method enumerated above. They contend that defendants utilized an express racial classification by stopping and questioning plaintiffs solely on the basis of their race. Plaintiffs assert that the district court erred in requiring them to plead the existence of a similarly situated group of non-minority individuals that were treated differently in the investigation of a crime.

When pleading a violation of the Equal Protection Clause, it is sometimes necessary to allege the existence of a similarly situated group that was treated differently. For example, if a plaintiff seeks to prove selective prosecution on the basis of his race, he "must show that similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

Plaintiffs are correct, however, that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict judicial scrutiny, *see Able v. United States*, 155 F.3d 628, 631-32 (2d Cir.1998), and strict scrutiny analysis in effect addresses the question of whether people of different races are similarly situated with regard to the law or policy at issue. This does not avail plaintiffs in this case, however, because they have not identified any law or policy that contains an express racial classification.

Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must

have been black. Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black Oneonta residents be questioned whenever a violent crime is reported. In short, plaintiffs' factual premise is incorrect: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. The description is not a suspect classification, but rather a legitimate classification of suspects.

Plaintiffs cite to cases holding that initiating an investigation of a person based solely upon that person's race violates the Equal Protection Clause. In *United States v. Avery*, 137 F.3d 343 (6th Cir.1997), the defendant claimed that he was stopped by law enforcement solely on the basis of his race. While the court affirmed his conviction, citing other factors utilized by the police in choosing to follow the defendant, the court stated that "[i]f law enforcement ... takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred." Id. at 355; *see also United States v. Scopo*, 19 F.3d 777, 786 (2d Cir.1994) (Newman, J., concurring) (speculating that while pretextual traffic stops based on probable cause are not Fourth Amendment violations, their selective use based on race could violate the Equal Protection clause). Here, the police were not routinely patrolling an airport for possible drug smuggling, as in Avery,

but were responding to a description given in a specific case.[8] Under the circumstances of this case, plaintiffs have failed to state a claim under the Equal Protection Clause.

Police practices that mirror defendants' behavior in this case–attempting to question every person in a general category–may well have a disparate impact on small minority groups in towns such as Oneonta. If there are few black residents, for example, it would be more useful for the police

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[8] The court's opinion in Avery also contained dicta to the effect that even if the police receive a "tip" consisting solely of a persons's race, "and the officers pursue investigations of everyone of that race, their action may be found constitutionally impermissible." 137 F.3d at 354 n. 5; *but cf.* Buffkins v. City of Omaha, 922 F.2d 465, 468 (8th Cir.1990) (holding that detention of black woman at an airport did not amount to racial discrimination under § 1981 because "her race matched the racial description of the person described in the tip"). We do not know if the "tip" contemplated by the Avery court is similar to a victim's description of an assailant; as the Avery court itself pointed out in somewhat contradictory fashion, where there is a tip from an outside source,"the officers obviously cannot control the race of the person they investigate and ultimately contact. Hence, their selection of that person as a target of investigation does not amount to an equal protection violation." 137 F.3d at 354 n. 5. In any event, this non-binding dicta from a non-binding circuit court does not persuade us that the police action in this case violated the Equal Protection Clause.

to use race to find a black suspect than a white one. It may also be practicable for law enforcement to attempt to contact every black person, but quite impossible to contact every white person. If an area were primarily black, with very few white residents, the impact would be reversed. The Equal Protection Clause, however, has long been interpreted to extend to governmental action that has a disparate impact on a minority group only when that action was undertaken with discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 239-41, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Without additional evidence of discriminatory animus, the disparate impact of an investigation such as the one in this case is insufficient to sustain an equal protection claim.

In addition, plaintiffs do not sufficiently allege discriminatory intent. They do allege that at least one woman, Sheryl Champen, was stopped by law enforcement officials during their sweep of Oneonta. This allegation is significant because it may indicate that defendants considered race more strongly than other parts of the victim's description. However, this alleged incident, to the extent that it was related to the investigation, is not sufficient in our view to support an equal protection claim under the circumstances of this case.

We are not blind to the sense of frustration that was doubtlessly felt by those questioned by the police during this investigation. The plaintiffs have argued that there is little difference between what occurred here and unlawful profiling based on a racial stereotype. While we disagree as a matter of constitutional law, we are not unmindful of the impact of this police action on community relations. Law enforcement officials should always be cognizant of the impressions they

leave on a community, lest distrust of law enforcement undermine its effectiveness. *Cf.* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 Colum. Hum. Rts. L.Rev. 551, 552 (1997) (describing the impact on the community of race-based pretextual traffic stops). Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause. We hold that it did not, and therefore affirm the district court's dismissal of plaintiffs' § 1983 claims alleging equal protection violations.

II. *Section 1981 Claims*

To establish a claim under 42 U.S.C. § 1981, plaintiffs must allege facts supporting the following elements: (1) plaintiffs are members of a racial minority; (2) defendants' intent to discriminate on the basis of race; and (3) discrimination concerning one of the statute's enumerated activities. *See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993) (per curiam). Those enumerated activities include the rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a).

Plaintiffs' claims under 42 U.S.C. § 1981 suffer from the same shortcomings as their equal protection claims. Section 1981, like the Equal Protection Clause, only prohibits intentional racial discrimination. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982); *see also Albert v.*

Carovano, 851 F.2d 561, 573 (2d Cir.1988) (holding that to plead a § 1981 claim alleging selective enforcement, plaintiff must allege instances in which "similarly situated" non-minorities were treated differently). Accordingly, plaintiffs must meet the same pleading standard for their § 1981 claims as for their § 1983 claims under the Equal Protection Clause, and these claims were insufficiently pleaded for the reasons stated above. We therefore affirm the dismissal of plaintiffs' § 1981 claims.

III. *Fourth Amendment Claims*

Plaintiffs' § 1983 claims also allege a violation of their Fourth Amendment rights during defendants' sweep of Oneonta. The district court dismissed many of these claims and granted summary judgment for defendants on other claims because, in its view, plaintiffs had not been subject to "seizures" under the Fourth Amendment.[9] For the reasons that follow, we vacate the summary judgment against plaintiffs Jean Cantave and Sheryl Champen, and affirm the district court's dismissal or grant of summary judgment with regard to the remaining claims.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d

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[9] The district court denied defendants' motions to dismiss or for summary judgment with respect to the Fourth Amendment claims of plaintiffs Jennings, Quinones and Plaskett. These plaintiffs later discontinued their Fourth Amendment actions by stipulation, and so their claims are no longer part of the case.

889 (1968), the Supreme Court established that the Fourth Amendment does not prohibit the police from stopping a person for questioning when the police have a reasonable suspicion that a person may be armed and dangerous, even when that suspicion does not amount to the probable cause necessary to make an arrest. *See* id. at 24-27, 88 S.Ct. 1868; *United States v. Jaramillo*, 25 F.3d 1146, 1150-51 (2d Cir.1994). Defendants would have difficulty demonstrating reasonable suspicion in this case, and indeed, they do not attempt to do so. Defendants instead argue that the district court correctly determined that no reasonable suspicion was necessary, because no seizure–not even a *Terry* stop–occurred in this case.

To prevail on a § 1983 claim under the Fourth Amendment based on an allegedly unlawful *Terry* stop, a plaintiff first must prove that he was seized. "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). However, a seizure does occur when, "by means of physical force or show of authority," *United States v. Hooper*, 935 F.2d 484, 491 (2d Cir.1991) (quoting *Terry*, 392 U.S. at 19 n. 16, 88 S.Ct. 1868), a police officer detains a person such that "a reasonable person would have believed that he was not free to leave," id. (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). Pertinent factors identifying a police seizure can include

> the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone

> indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room.

Hooper, 935 F.2d at 491 (quoting *United States v. Lee*, 916 F.2d 814, 819 (2d Cir.1990)). With regard to each plaintiff, we review a finding of whether a seizure has occurred *de novo*. *See Gardiner v. Incorporated Village of Endicott*, 50 F.3d 151, 155 (2d Cir.1995).

Jamel Champen, in his affidavit, alleges that a police officer pointed a spotlight at him and said "What, are you stupid? Come here. I want to talk to you." He was then told to show his hands. Despite the alleged rudeness of this encounter, the district court was correct in determining that this did not amount to a seizure. The encounter was brief in duration, and the police officer only looked at Champen's hands.

Jean Cantave avers that he was driving in Oneonta when he was pulled over by a police car with a siren and flashing lights. Cantave was ordered out of the car and instructed to place his hands on top of the car. The Supreme Court has stated that the "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' " under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Under *Whren*, we have no doubt that Cantave was

seized, and accordingly we vacate the summary judgment for defendants on Cantave's claim.

Ricky Brown's affidavit states that three police officers stopped him on the street. The police officers questioned him about whether he was a student and where he had been. They asked for his identification card, passed it around, and returned it to Brown. At one point, the officers "formed a circle around" Brown. When Brown asked if he had permission to leave, they told him that he was free to go. One officer then asked him to come back and asked to see Brown's hands. Although there were several officers present, none of them had physical contact with Brown, and the officers explicitly told Brown that he was free to leave. While it is a closer case then some, we agree with the district court that no seizure occurred, and affirm the summary judgment for defendants on Brown's Fourth Amendment claim.

Sheryl Champen alleges that a police officer approached her at a bus station and told her that if she wanted to board the bus for which she was waiting, she would have to produce some identification. This contact is plainly a seizure under the caselaw because the police officer made it clear that he was detaining her. Accordingly, we vacate the summary judgment for defendants on Sheryl Champen's claim.

Raishawn Morris alleges that he encountered two police officers in his dorm lobby, and that they asked him to show them his hands. This does not rise to the level of a seizure, and we affirm the summary judgment for defendants on Morris's claim.

Finally, we also affirm the district court's dismissal of the remaining Fourth Amendment claims. The other plaintiffs did not submit any affidavits describing the details of their contacts with defendants, and the complaint fails to allege facts stating a claim that they were seized by defendants. *See Sheppard v. Beerman*, 18 F.3d 147, 153 (2d Cir.1994).

IV. *Claims Under §§ 1985(3) & 1986*

Plaintiffs also asserted causes of action under 42 U.S.C. §§ 1985(3) and 1986. The elements of a claim under § 1985(3) are: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, ...; (3) an act in furtherance of the conspiracy; (4) whereby a person is ... deprived of any right of a citizen of the United States." *Mian*, 7 F.3d at 1087. The conspiracy must be motivated by racial animus. *See id.* at 1088. Because a claim under § 1985(3) requires proof of discriminatory racial animus, we affirm the district court's dismissal of plaintiffs' § 1985(3) claims for the same reasons that we dismissed plaintiffs' equal protection and § 1981 claims, discussed in detail above. And because "a § 1986 claim must be predicated on a valid § 1985 claim," *id.*, plaintiffs' § 1986 claim was properly dismissed as well.

CONCLUSION

We affirm the dismissal of plaintiffs' § 1983 claims under the Equal Protection Clause. We also affirm the dismissal of plaintiffs' claims under §§ 1981, 1985(3) and 1986. With regard to the plaintiffs' § 1983 claims under the Fourth Amendment, we affirm the district court's dismissal of

these claims except those of plaintiffs Jean Cantave and Sheryl Champen. We vacate the district court's grant of summary judgment on those claims, and remand the case to the district court for further proceedings. Jean Cantave and Sheryl Champen may continue to litigate their § 1983 claims of Fourth Amendment violations against all law enforcement defendants except Redmond and Olsen, against whom their claims were previously dismissed.

Affirmed in part, vacated in part, and remanded. Each party shall bear its own costs.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

December Term 2000

Docket No. 98-9375

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of December, two thousand.

RICKY BROWN, on behalf of himself and all other persons similarly situated; JAMEL CHAMPEN, on behalf of himself and all other persons similarly situated; SHERYL CHAMPEN, on behalf of herself and all other persons similarly situated; HOPETON GORDON, on behalf of himself and all other persons similarly situated; JEAN CANTAVE, on behalf of himself and all other persons similarly situated; RAISHAWN MORRIS, on behalf of himself and all other persons similarly situated; TIM RICHARDSON, on behalf of themselves and all other persons similarly situated; DARRYL TAYLOR, on behalf of themselves and all other persons similarly situated; ROBERT WALKER, on behalf of themselves and all other persons similarly situated; CLEMENT MALLORY, on behalf of themselves and all other persons similarly situated; RONALD SANCHEZ, on behalf of themselves and all other persons similarly situated; DARNELL LEMONS, on behalf of themselves and all other persons similarly situated; JOHN BUTLER, on behalf of themselves and all other persons

similarly situated; JASON CHILDS, on behalf of themselves and all other persons similarly situated; PAUL HEYWARD, JR., on behalf of themselves and all other persons similarly situated; RONALD JENNINGS, on behalf of themselves and all other persons similarly situated; PAUL HOWE, on behalf of themselves and all other persons similarly situated; BUBU DEMASIO, on behalf of themselves and all other persons similarly situated; WILSON ACOSTA, on behalf of themselves and all other persons similarly situated; CHRIS HOLLAND, on behalf of themselves and all other persons similarly situated; JERMAINE ADAMS, on behalf of themselves and all other persons similarly situated; FELIX FRANCIS, on behalf of themselves and all other persons similarly situated; DANIEL SONTAG, on behalf of themselves and all other persons similarly situated; RONALD LYNCH, on behalf of themselves and all other persons similarly situated; KENNETH MCCLAIN, on behalf of themselves and all other persons similarly situated; HERVEY PIERRE, on behalf of themselves and all other persons similarly situated; VINCENT QUINONES, on behalf of themselves and all other persons similarly situated; LAURENCE PLASKETT, on behalf of themselves and all other persons similarly situated; LAMONT WYCHE, on behalf of themselves and all other persons similarly situated; STEVEN YORK, on behalf of themselves and all other persons similarly situated; TYRONE LOHR, on behalf of themselves and all other persons similarly situated; KING GONZALEZ, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

RAISHAWN MORRIS,

Appellant,

CHARLES BATTISTE, on behalf of himself and all other persons similarly situated; WAYNE LEWIS, on behalf of himself and all other persons similarly situated; MICHAEL CHRISTIAN, on behalf of themselves and all other persons similarly situated; MAJOR BARNETT, on behalf of himself and all other persons similarly situated,

Plaintiffs,

—v.—

CITY OF ONEONTA, NEW YORK; POLICE DEPARTMENT OF THE CITY OF ONEONTA, NEW YORK; JOHN J. DONADIO, Chief of Police of the City of Oneonta, in his individual and official capacities; JOSEPH REDMOND, Oneonta Police Officer, in his individual and official capacities; WILLIAM M. DAVIS, Oneonta Police Officer, in his individual and official capacities; X. OLSEN, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS OFFICERS AND INVESTIGATORS OF THE POLICE DEPARTMENT OF THE CITY OF ONEONTA, in their individual and official capacities; THE STATE OF NEW YORK; STATE UNIVERSITY OF NEW YORK; STATE UNIVERSITY OF NEW YORK, COLLEGE AT ONEONTA ("SUCO"); NEW YORK STATE DIVISION OF STATE POLICE; H. KARL CHANDLER, New York State Police Investigator, in his individual and official capacities; ROBERT FARRAND, New York State Police Troop C Commander, in his individual and official capacities; GEORGE CLUM, New York State Police Investigator, in his individual and official capacities; KEVIN MORE, New York State Police Investigator, in his individual and official capacities; JOHN WAY, New York State Police Investigator, in his official

capacities; MARK KIMBALL, New York State Trooper, in his individual and official capacities; KENNETH GRANT, New York State Trooper, in his individual and official capacities; NEW YORK STATE TROOPER FARRAGO, in his individual and official capacities; ANONYMOUS STATE POLICE OFFICIALS AND INVESTIGATORS, in their individual and official capacities; SUCO DEPARTMENT OF PUBLIC SAFETY; MERRITT HUNT, SUCO Department of Public Safety Officer, in his individual and official capacities; TIM JACKSON, SUCO Department of Public Safety Officer, in his individual and official capacities; JOHN EDMONDSON, SUCO Department of Public Safety Officer, in his individual and official capacities; HARTMARK LEIF, in his individual and official capacities; ERIC WILSON, in his individual and official capacities; CARL SHEDLOCK, Oneonta Police Officer, in his individual and official capacities; ANONYMOUS PUBLIC SAFETY OFFICERS, in their individual and official capacities; ANONYMOUS SUCO COMPUTER EMPLOYEES, in their individual and official capacities; SEAN RALPH, Otsego County Sheriff's Deputy; CHRIS LEHENBAUER, Otsego County Sheriff's Deputy; ANONYMOUS OTSEGO CITY; ANONYMOUS OTSEGO COUNTY SHERIFF'S DEPUTIES, INVESTIGATORS AND/OR OFFICERS,

Defendants-Appellees.

A petition for rehearing and rehearing in banc from the amended opinion of the panel filed on August 8, 2000 having been filed by plaintiffs-appellants,

Upon consideration by the panel that decided the

appeal, it is Ordered that said petition for rehearing is hereby **DENIED.**

It is further noted that the petition for rehearing in banc having been transmitted to the judges of the Court and to any other judge that heard the appeal and a request for an in banc vote having been made by a judge of the Court in regular active service, and a poll of the judges in regular active service having been taken, and there being no majority in favor thereof, rehearing in banc is **DENIED.**

Judges Kearse, Calabresi, Parker, Straub and Sotomayer dissent from the denial of rehearing in banc. Chief Judge Walker has filed an opinion concurring in the denial of rehearing in banc. Judge Jacobs has filed a separate concurring opinion and Judges Sack and Katzmann together have filed a separate concurring opinion. Judge Calabresi has filed a separate opinion dissenting from the denial of rehearing in banc which is joined by Judge Straub, and by Judges Sotomayor and Parker in part. Judge Straub has also filed a separate opinion dissenting from the denial of rehearing in banc which is joined by Judge Calabresi.

/s/ Roseann B. MacKechnie
Roseann B. MacKechnie
Clerk

JOHN M. WALKER, Jr., Chief Judge, concurring in the denial of rehearing *in banc*:

The reasoning in support of the panel's decision, fully set forth in the panel opinion, needs no elaboration. *See Brown*

v. City of Oneonta, 221 F.3d 329 (2d Cir.2000). Some of the judges dissenting from denial of rehearing *in banc,* however, have chosen this occasion to advance, for the first time, novel equal protection theories that, in my view, would severely impact police protection. While such new theories are common to the pages of an academic journal to which interested critics might reply in the fullness of time, their appearance in this venue requires a more immediate response.

The dissenters propose that when the police have been given a description of a criminal perpetrator by the victim that includes the perpetrator's race, their subsequent investigation to find that perpetrator may constitute a suspect racial classification under the equal protection clause. Judge Straub's view is that equal protection review is triggered whenever the police rely on a physical description provided by a victim or witness that includes race as the basis for conducting an investigation. Judge Calabresi believes that equal protection review arises in a slightly narrowed, yet related situation: when the police ignore the non-racial components of the provided description and question persons who, except for the racial descriptor, do not fit the description provided.

The fact that no legal opinion, concurrence, dissent (or other judicial pronouncement) has ever intimated, much less proposed, any such rules of equal protection confirms a strong intuition of their non-viability. But, for the benefit of anyone who in the future may be undeterred by the inability of these theories to attract judicial recognition, their practical difficulties and analytical defects should be recognized.

I. General Concerns

For better or worse, it is a fact of life in our diverse culture that race is used on a daily basis as a shorthand for physical appearance. This is as true in police work as anywhere else. The theories suggested by the dissenters would require a police officer, before acting on a physical description that contains a racial element, to balance myriad competing considerations, one of which would be the risk of being subject to strict scrutiny in an equal protection lawsuit. Moreover, the officer frequently would have to engage in such balancing while under the pressure of a time- sensitive pursuit of a potentially dangerous criminal. Police work, as we know it, would be impaired and the safety of all citizens compromised. The most vulnerable and isolated would be harmed the most and, if police effectiveness is hobbled by special racial rules, residents of inner cities would be harmed most of all.

There have been times and places in this country in which the police have tolerated crime in African-American communities. *See, e.g.*, John Dollard, *Caste and Class in a Southern Town* (1937). They have done this on a variety of assumptions, all of them degrading, and one of them was that the victims in these neighborhoods were somehow less important to the then dominant white community from which the police drew their support. Although still imperfect, the more racially diverse police of today generally strive to serve and protect those within African-American communities as they do those within every other community.

I have little doubt that the rules of constitutional law proposed by my colleagues would weaken police protection

within all communities. Regrettably, the social costs of frustrating police investigations receive no mention in either dissent. In my view, it is a grave mistake to seize upon an idea that would alter police work and law enforcement procedures fundamentally without fully considering its effect on those most vulnerable to crime.

In addition to potentially chilling police protection, and tying up officers in added court proceedings, these new rules would be implicated in many ordinary police investigations. As a result, these rules would likely undermine the strict scrutiny standard itself, because apprehending dangerous criminals in almost all instances would constitute a compelling state interest. Frequent satisfaction of strict scrutiny as police go about their daily work of investigating crime would likely have spillover effects into other areas of equal protection law, diluting the standard's efficacy where we would want it to retain its power.

II. Judge Straub's Proposal

The panel determined in this case that the police interviews of African-Americans in Oneonta–conducted in the hope of finding a person fitting the victim's description of the perpetrator, a young, African-American male with a cut on his hand–did not trigger equal protection scrutiny because the officers, by acting on the basis of a description provided by the victim, proceeded in a race neutral manner, and limited their search for a suspect to persons fitting the victim's description.

The rule that Judge Straub proposes is far broader and more trouble- prone than any possible emanations from the

fact-specific holding of the panel opinion. Judge Straub suggests that whenever the police use a racial descriptor, they are employing a suspect racial classification, and should therefore be subject to strict judicial scrutiny. Indeed, under his theory, the police would face litigation even where the racial descriptor is combined with other common descriptors such as age, gender, and a physical marking (as was the case here), even if the police adhere faithfully to that description, and "regardless of [its] *source.*" *See post* at 790 (Straub, J. dissenting) (emphasis in original).

This rule would impede the most routine police work, particularly criminal investigations. A description of a perpetrator received by the police will often include only general attributes such as the perpetrator's race, height and sex. If strict scrutiny were triggered by the mere presence of a racial descriptor, an officer would be subject to a lawsuit simply for trying to supplement a sparse description--and thereby narrow the field of potential suspects--by interviewing other persons who fit the racial description but are not yet suspects. Indeed, the police would be employing a suspect racial classification (and thus would be required to show a compelling state interest) whenever they "use" a racial descriptor, whether it is in an internal report, an equal opportunity employment database, a criminal investigation, or in simply recording or relaying a witness' description.

The right to equal protection is an individual one. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 1074-75, 145 L.Ed.2d 1060 (2000). Under Judge Straub's theory, therefore, the right not to be questioned (absent a compelling state interest and by means narrowly tailored to the

pursuit of such interest), would be offended whenever the police act upon a description that includes race, regardless of whether the person questioned was the two hundredth approached by the police or the only one. Nothing in Judge Straub's opinion suggests that his rule would be limited to exclude a situation in which an officer observes a crime on the street, follows the perpetrator into an empty restaurant, and questions the only customer there who fits the race of the perpetrator he observed. In short, it is difficult to discern limits to the impediments Judge Straub's rule would place on ordinary police work.

III. Judge Calabresi's Proposal

Judge Calabresi, although discomforted by the panel's decision that equal protection considerations are inapplicable when the police follow a victim's description that includes race, acknowledges certain difficulties with a contrary position. He correctly recognizes that under present law "[i]f an action is deemed a racial classification, it is very difficult, under the Supreme Court precedent, ever to justify it" and making such justification easier "in cases of police following a victim's description" would lead to an undesirable spillover in other racial classification contexts. *See post* at 786 (Calabresi, J. dissenting). "In other words, were the requirements of strict scrutiny to be relaxed in the police/victim's description area, it would be hard indeed to keep them from also being weakened in other areas in which racial classifications ought virtually never to be countenanced." *Id.* He concludes, therefore, that "courts should recognize severe limitations on their competence to deal with victim's racial descriptions." *Id.*

Unable to discern a plausible jurisprudential basis for an equal protection claim when the police follow a victim's description, Judge Calabresi proposes a variant rule that he says this case raises: strict scrutiny is triggered if the police *disregard* all but the racial component of the victim's description. More precisely, he states the rule as "*the police created and acted upon a racial classification* [that triggers strict scrutiny] *by setting aside all but the racial elements in the victim's description.*" *Id.* at 781 (emphasis in original).

A. *In Banc* Considerations

As noted above, Judge Calabresi's rule has neither been proposed, let alone adopted, by any court. So far as I can tell (or Judge Calabresi claims), it has never before been thought of. But more to the point in this litigation, it was at no time argued by the plaintiffs and in fact is not supported by the pleadings. As a matter of *in banc* policy, substantive law, and sound jurisprudence, this court has appropriately declined to reach out and embrace this new untested rule on facts that do not put it at issue.

It is well-settled in this court that "[a] conclusory allegation without evidentiary support or allegations of particularized incidents, does not state a valid claim." *Kern v. City of Rochester*, 93 F.3d 38, 44 (2d Cir.1996) (quoting *Butler v. Castro*, 896 F.2d 698, 700 (2d Cir.1990)). Judge Calabresi relies chiefly on a general allegation in the complaint that the police "attempted to stop ... any and every non-white person in and around the City of Oneonta." Second Amended Complaint at 4; *see also id.* at 30 ("the objective, as defendant Chandler [the State police investigator in charge of the investigation] told

the newspapers *Newsday* and the *Oneonta Daily Star*, was to try 'to examine the hands of all black people in the community.' "). *Id.* at 2. But these are just the sort of general, bald allegations prohibited by *Kern* and *Butler*. And the complaint has a strange way of alleging, as Judge Calabresi reads it, that the police stopped African- Americans without regard to their age and sex. Indeed, the allegation is hedged as an "attempt" and seemingly includes other "non-whites" (for example, Asians, Native Americans, Hispanics). Moreover, it is vague on precisely the subject as to which specificity from the plaintiffs would be expected: departure from the given description. In sum, no where does the complaint allege that the police actually did depart from the description given by the victim. That such a contention is absent is not surprising: it strikes me as nonsensical to believe that the police, who have been given a description of the attacker, would disregard the description and look for someone else.

Perhaps realizing the deficiency in the allegation he points to, Judge Calabresi scours the approximately one-hundred-page complaint and the record below to patch together scattered demographic references in an effort to tease out an inference that the police stopped numerous black women. His math is speculative and ends up presenting at most another insufficiently particularized allegation. *See post* at 782 (Calabresi, J. dissenting) Only one relevant allegation with the required specificity appears in the complaint: that the police stopped Sheryl Champen, a woman. To be sure, this one stop could have been in disregard of the victim's description of the attacker as male. But it is far more likely that the police, who after stopping her did not ask to see her hands, were initially mistaken about her sex or, because she was boarding a bus,

feared losing a person with relevant information. In any event, the solitary fact that Ms. Champen was questioned cannot support the far broader claim that the police systematically strayed from the bounds of the description they were given and stopped "any and every" African-American in Oneonta.[1]

Judge Calabresi's suggestion that we instruct the district court in this case to allow the plaintiffs to submit a *fourth complaint* which could then allege facts that could support his proposed rule introduces a jurisprudential danger. A footnote in the panel opinion permits repleading, *see Brown v. City of Oneonta*, 221 F.3d 329, 339 n. 9 (2d Cir.2000), but it does so only to the extent that the district court's understanding of the law of this circuit is clarified *by the panel opinion.* Had this court actually adopted Judge Calabresi's new rule and directed the district court to permit repleading, and had the plaintiffs still been unable to state a case, which in my view is likely, this court would have announced a novel rule of constitutional law on a fact scenario that Judge Calabresi has simply hypothesized from a creative (and strained) reading of the complaint. As a rule of constitutional law, it would be impervious to legislative change, drifting about, untethered by any factual anchor, turning up in odd contexts, uninvited and inapt. The case and controversy requirement of Article III, both as the supreme law

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[1] Judge Calabresi also thinks the police request for a list of black male students at SUCO creates an inference that they departed from the victim's description. But this fact does not support Judge Calabresi's claim that the police wanted to stop elderly matriculants as well as those supposed to be college-aged.

of the land and as wise jurisprudence, requires more than a hypothetical scenario to introduce far reaching constitutional strictures into the law.

B. Criticisms

Putting aside the fact that Judge Calabresi's creative proposed rule is not presented in this case, in my view it is flawed and unworkable.

Judge Calabresi's opinion describes the proposed rule variously as: (i) "*the police create[d] and act[ed] upon a racial classification* [that triggers strict scrutiny] *by setting aside all but the racial elements in the victim's description*" and (ii) "[the state is] creating an express classification that can only be approved if it survives strict scrutiny when state officers (like the police) ignore essentially everything but the racial part of a victim's description, and, acting solely on that racial element, stop and question all members of that race they can get hold of, even those who grossly fail to fit the victim's description[.]" *See post* at 781 (Calabresi, J. dissenting) (emphasis in original).

If this proposed rule were adopted, it would mean that whenever the police are given a description that includes race, simply asking questions of a person of that same race who does not otherwise fit the description would violate that person's constitutional right to equal protection unless the state could (1) show a compelling state interest and (2) that the questioning was essential to achieving that interest.

Innocent situations that could trigger liability under

Judge Calabresi's rule spring to mind. For instance, the proposed rule would apply to any situation in which the police were trying to find a fleeing suspect in a defined and limited area, such as a restaurant, a sidewalk, a parking lot, or a building, regardless of how many people occupied the area in question. In such a situation, officers often cannot know with complete certainty whether the person they question eventually might turn out to be a suspect, not least because they can never be sure of the accuracy of the victim's description, or whether the person so described has somehow subsequently altered his or her appearance, perhaps by shedding tell-tale clothing.

Judge Calabresi's rule also would apply to instances where a police officer forgets or confuses part of the description--whether the perpetrator was wearing a grey jacket or a brown one, for example. In such instances, prudent officers would fear to question anyone at all lest they draw an equal protection lawsuit. Finally, and perhaps most troubling, Judge Calabresi's proposal, were it adopted, might be used as a prophylactic device to invalidate the arrest of the actual perpetrator, if that person could successfully argue that when he was first stopped and questioned he imperfectly "fit" a victim description that included race.

C. Fourth Amendment Safeguards

The Fourth Amendment's prohibition on unreasonable searches and seizures, carefully calibrated by the Supreme Court over two centuries, balances law enforcement needs against the rights of the citizen to be protected. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Three levels of interaction between the police and

private citizens have developed under Fourth Amendment jurisprudence: voluntary encounters that do not require justification, so long as the police do not intimate that their requests must be heeded, *see United States v. Tehrani*, 49 F.3d 54, 58 (2d Cir.1995); investigative detentions, so called *Terry* stops, that do require a justification of reasonable suspicion of criminal activity, *see Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); and finally, arrests that require a demonstration of probable cause, *see Tehrani*, 49 F.3d at 58. This framework, arrived at over the years through case-by-case adjudication, in the context of concrete factual settings, strikes an appropriate balance between individual rights and the necessities of effective law enforcement. *See United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

Judge Calabresi's proposal, by injecting equal protection analysis into police investigations that rely on racial descriptors, would upset this carefully crafted balance.[2]

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[2] Judge Calabresi also argues that our circuit's Fourth Amendment law concerning whether a stop has occurred needs to be clarified. Judge Calabresi maintains that it is unsettled whether the reasonableness determination-that is, deciding whether a reasonable person would have felt free to leave-is a question of fact or one of law. *See post* at 780-81 n. 1 (Calabresi, J. dissenting). I think the law is clear on this point. The question of whether a seizure occurred is a question of law, *see Oneonta,* 221 F.3d at 340; the circumstances underlying that determination are questions of fact for the jury. *See id.*

(continued...)

[2](...continued)

Whether a seizure occurred is determined by asking whether a reasonable person would have felt free to leave. Because the seizure determination is a question of law, it follows *a fortiori* that ascertaining reasonableness is also a question of law. *See United States v. Peterson*, 100 F.3d 7, 11 (2d Cir.1996) (reviewing *de novo* the district court's determination, before trial, that a reasonable person would have felt free to leave); *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir.1991) ("[W]e believe that ... whether those statements and acts resulted in a seizure is a question of law subject to *de novo* review."); *see also United States v. Espinosa-Guerra*, 805 F.2d 1502, 1507 n. 18 (11th Cir.1986) ("[t]he trial court's determination of whether a reasonable person would have believed that he is not free to leave is a question of law" (internal quotation marks omitted)).

The single case from our circuit that Judge Calabresi says supports the view that a reasonableness determination under the Fourth Amendment is a question of fact is inapposite. *See Posr v. Doherty*, 944 F.2d 91 (2d Cir.1991). The question in *Posr*, in which I wrote the opinion, was not whether police action constituted a seizure, but whether an arrest had occurred. And, as Judge Calabresi notes, the question of when an investigative stop ripens into an arrest is for the finder of fact. *See Tehrani*, 49 F.3d at 58. Because in *Posr* the jury had already found that the police had used excessive force, we noted that as a practical matter the only determination left for the jury on remand was reasonableness. *See Posr*, 944 F.2d at 99-100. The fact that reasonableness was an issue for the jury in that case followed

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Fearing personal liability through Section 1983, 42 U.S.C. § 1983, litigation from equal protection violations arising from their investigative activities, police officers would undoubtedly fail to act in situations where we would expect them to.

The indefensibility of accepting the social costs of chilled policing in this context becomes all the more apparent when one considers the present reach of the Fourth Amendment: the gap in constitutional protection that Judge Calabresi believes to be created by the panel opinion and that he intends his rule to remedy is a narrow one. Judge Calabresi's proposed approach would impose equal protection analysis without regard to whether the person encountered by an officer was arrested, temporarily detained for questioning or simply asked questions while remaining free to walk away.

Fourth Amendment jurisprudence--though not a general bar to racial discrimination or classification--already prohibits arrests and *Terry* investigatory detentions in many situations with which Judge Calabresi is concerned, that is, where "state officers (like the police) ignore essentially everything but the racial part of a victim description, and acting solely on that racial element stop and question all members of that race they can get hold of even when those questioned grossly fail to fit the victim's description." See post at 564 (Calabresi, J. dissenting). Such stops based on racial considerations alone,

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[2](...continued)
from its peculiar posture and from the arrest issue. The law is otherwise clear that whether a seizure has occurred-that is, whether a reasonable person would have felt free to leave-is a question of law for the court.

absent compelling exigent circumstances, would almost never rest on the constitutionally required "reasonable articulable suspicion" of criminal activity needed to justify an investigatory detention, *see, e.g., U.S. v. Brignoni-Ponce*, 422 U.S. 873, 885-86, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (no reasonable suspicion for border agent to detain person based solely on apparent Mexican ancestry),[3] and *a fortiori* would never rise to the level of probable cause for a warrantless arrest. *Cf. Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (applying Fourth Amendment analysis and not more generalized due process guarantee to arrests, investigatory detentions, and "other 'seizure[s]' of a free citizen

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[3] Lower courts are generally in accord that race alone will not support a Terry stop under the Fourth Amendment. *See, e.g., U.S. v. Grant*, 920 F.2d 376, 388 (6th Cir.1990) (no reasonable suspicion to detain person when agents' only basis for stop was that man of color wearing dreadlocks was illegal alien from Jamaica and traveled from drug-source city); *Buffkins v. City of Omaha*, 922 F.2d 465, 470 (8th Cir.1990) (no reasonable suspicion when informant's tip merely described race of person and person carried toy animal that appeared to be resewn); *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir.1994) (no reasonable suspicion for INS agent to seize person based solely on "Nigerian-sounding name"); *U.S. v. Tapia*, 912 F.2d 1367, 1371 (11th Cir.1990) ("no reasonable suspicion supported further detention of vehicle beyond citation for speeding when suspect Mexican had out-of-state license plates, appeared visibly nervous during confrontation with officers, and had few pieces of luggage").

... [b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection" as opposed to the "more generalized notion of 'substantive due process' "). Therefore, it is only for police encounters falling short of a restraint "by means of physical force or show of authority," *Terry*, 392 U.S. at 19 n. 16, 88 S.Ct. 1868, that Judge Calabresi's proposed introduction of equal protection analysis would supply constitutional protections presently unavailable under the Fourth Amendment.

I believe that any benefits from extending equal protection guarantees to such situations, where the citizen who is questioned is not deprived of his liberty even for a brief period of time and remains free at all times to walk away from the officer, are outweighed by the additional costs to effective law enforcement.[4] Officers rely on their ability to act on non-articulable hunches, collected experience, intuition, and sense impressions--all of which are crucial in carrying out a criminal investigation. Officers would be forced to justify these intuitive considerations in order to meet an accusation that race was the sole factor motivating the encounter. The

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[4] I do not believe Judge Calabresi's proposed rule to be "superfluous," *see post* at 787-88 n. 13 (Calabresi, J. dissenting), because of the existence of Fourth Amendment protections. To the contrary, mypoint is that the potential constitutional protections his unprecedented rule would afford to potential criminal suspects (who are in no way restrained but may be offended by the police encounters) would add to those that exist but would upset the Fourth Amendment's careful balance of interests and entail unacceptable costs to society.

unworkability of such a regime is self-evident.

If some guidelines for officers conducting non-restraint encounters based on victim or witness descriptions, where race is a component of the description, are needed (about which I have no opinion), then they are more appropriately established by bodies with political accountability and with more experience and insight into the nuances of community policing than unelected life-tenured federal judges. State legislatures, municipal councils, and citizen oversight boards are far better suited than courts to balance the complicated considerations regarding the community's policing needs and the sensibilities of minorities who may feel unfairly targeted.

Judge Calabresi is understandably troubled by the facts of this case, as no doubt were the plaintiffs to an even greater degree. But it seems to me that his proposed new rule has missed the real source of that discomfort. It is not that the police strayed from the description they were given, if stray they did. Rather, it is that the police conducted an investigation that went through the town seeking to stop every young African-American male fitting the description the victim provided. The proper judicial remedy for people who were stopped and questioned during that investigation, as I have noted, is under the articulated and available standards of the Fourth Amendment; and several of those stopped have pursued that remedy. The constitutional rule that Judge Calabresi has fashioned, by contrast, would hamper police efforts in investigating countless individuals--investigations that bear little or no resemblance to the "sweep" that is alleged to have occurred in this case. The consequent crippling of law enforcement in the more individualized contexts of daily police

work would exact severe societal costs, and nowhere more so than in minority neighborhoods. The obvious presence of such costs counsels strongly against deciding to go *in banc* in order to elaborate *ex nihilo* a broad new rule of equal protection law that would constrain the police in situations that do not implicate the Fourth Amendment.

For these reasons, I concur in the court's decision to deny this petition for rehearing *in banc*.

JACOBS, Circuit Judge, concurring:

I concur in the denial of in banc review, and do so by opinion in order to say why I am wholly unconvinced by the dissenting analysis advanced by Judge Calabresi and in broader strokes by Judge Straub. Opinions pro and con on the denial of rehearing belong to a deservedly neglected genre. But I consider an opinion worth doing this time because an unintended subtext of Judge Calabresi's opinion is that the panel opinion may be insufficiently deferential to large communities of Americans.

The premise of Judge Calabresi's dissenting opinion is that the complaint, fairly read, alleges that in investigating a crime the Oneonta police treated as a suspect every minority individual regardless of sex or age, in disregard of every feature of the victim's description except race. Since Judge Calabresi concedes that the police investigation was conducted without racial animus, his opinion makes the unnatural assumption that the police simply imposed on themselves a mindless burden that would only delay finding a likely suspect.

Judge Calabresi's reading of the 100-page complaint relies on an aggressive interpretation of passages juxtaposed from here and there, and conceives a claim that the plaintiffs themselves did not urge. Thus the complaint has been made to yield trace allegations deemed sufficient to justify a remand for yet another amended complaint, so that facts can be pleaded that may float Judge Calabresi's views on a sensitive and vexed social question.

Even assuming that this case presented a problem unsolved by the panel, the prescription that Judge Calabresi offers is a bad idea. Judge Calabresi's opinion says that strict scrutiny should apply when the police disregard all features of a description given by a witness or victim and search solely on the basis of race. It seems to me pointless to convene the Court in banc in order to announce such a principle, because I don't see how it would ever arise in an actual case: if, for example, the description is of a short black man with cropped hair, why would the police stop all black men, women and children, short and tall, long hair, short hair, or bald?

I notice, however, that the constitutional doctrine advanced in Judge Calabresi's opinion would (if it can support anything) support a much broader principle, namely, that when a witness or victim describes a suspect in terms that include race, any deviation by the police from the non-racial descriptive features will be deemed the making of a racial classification subject to strict scrutiny. As Judge Calabresi's opinion goes along, it speaks in these broader terms: e.g., "ignor[ing] *essentially everything* but the racial part of a victim's description;" "focusing ... *solely or predominantly* on the fact that the perpetrator was black;" "focus[ing] *almost exclusively*

on [ ] racial elements." *See post* at 781, 782 (Calabresi, J., dissenting) (emphasis added).

In order for this Court to direct that the district court accept the present pleading or accept a further amended pleading that spells out Judge Calabresi's doctrine, we would have to hold that such a pleading states a claim for relief. I would vote against an in banc proceeding intended to advance such a doctrine for several reasons. The doctrine, as Judge Walker explains in his concurring opinion, is unworkable. And it is advanced without the inputs of briefing, precedent or scholarship, on which we have made it our habit to rely. Specifically, the doctrine is unaided by any input from the law enforcement community or from any of the other branches or organs of government. Moreover, the doctrine is based on unexamined notions now current in the bien pensant community rather than on any previously understood principles of policing or (for that matter) constitutional law, and is therefore incompletely baked. Finally, it trivializes strict scrutiny by applying it in routine circumstances in which the conduct scrutinized will be routinely validated.

If Judge Calabresi's prescription is bad, the side effects are worse. As Judge Walker points out, Judge Calabresi's rule would impose paralyzing inhibitions on law enforcement officers in minority communities. That is because fear of lawsuits, investigations and departmental discipline will tend to make the police in minority communities defensive, passive and scarce. No doubt, some people will think that is a good idea, but no community has yet elected to rely on police protection furnished by a corps of federal judges, and in any event it is presumptuous to assume that any community is of

one mind on such an issue. Finally, Judge Calabresi's idea is certainly not one that a Court should casually adopt as immutable constitutional doctrine without the petition of any party to a case or controversy.

SACK and KATZMANN, Circuit Judges, concurring in the denial of rehearing in banc:

We concur in the Court's decision to deny rehearing *in banc* because we think it would likely be unproductive. We note, however, our view that the Court should have remanded to the district court allowing the plaintiffs to amend their complaint in light of the panel's clarifying language with respect to the Equal Protection Clause in its amended opinion.

KEARSE, Circuit Judge, dissenting from the denial of rehearing en banc:

I dissent.

CALABRESI, Circuit Judge, with whom Judge STRAUB joins, and with whom Judges PARKER and SOTOMAYOR join (with the exception of Part VI), dissenting from the denial of a rehearing *in banc*:

The panel opinion, *Brown v. Oneonta*, 221 F.3d 329 (2nd Cir.2000), fails adequately to deal with a fundamental issue raised by the plaintiffs' allegations. It does so in contravention of established precedents of the Supreme Court

of the United States and of our court. Because of this failure, the panel is led, unnecessarily I think, to express views on a topic that is both complex and divisive. All this occurs in a context--police investigations in which race is a factor--that implicates some of the deepest and most searing questions in our society. I believe that review of the panel's opinion is essential, and hence respectfully dissent from the denial of a rehearing *in banc*.

I

The facts in this case speak for themselves. They can be stated simply and are taken, for the most part, from the panel opinion.

> Oneonta, a small town in upstate New York about sixty miles west of Albany, has about 10,000 full-time residents. In addition, some 7,500 students attend and reside at the State University of New York College at Oneonta ("SUCO"). The people in Oneonta are for the most part white. Fewer than three hundred blacks live in the town, and just two percent of [approximately 150 out of 7,500] students at SUCO are black.
>
> On September 4, 1992, shortly before 2:00 a.m., someone broke into a house just outside Oneonta and attacked a seventy-seven-year-old woman. The woman told the police who responded to the scene that she could not identify her assailant's face, but that he was wielding a knife; that he was a black man,

based on her view of his hand and forearm; and that he was young, because of the speed with which he crossed her room. She also told the police that, as they struggled, the suspect had cut himself on the hand with the knife. A police canine unit tracked the assailant's scent from the scene of the crime toward the SUCO campus, but lost the trail after several hundred yards.

The police immediately contacted SUCO and requested a list of its black male students. An official at SUCO supplied the list, and the police attempted to locate and question every black male student at SUCO. This endeavor produced no suspects. Then, over the next several days, the police conducted a "sweep" of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended. Those persons whose names appeared on the SUCO list and those who were approached and questioned by the police, believing that they had been unlawfully singled out because of their race, decided to seek redress.

Id. at 334.

As the opinion goes on to note, despite the description given by the victim, "at least one woman, Sheryl Champen, was [allegedly] stopped by law enforcement officials during

their sweep of Oneonta." *Id.* at 338. In addition, though the panel does not mention it, the plaintiffs also alleged that:

> During the "sweep," which occurred over a five day period, the officials, without any basis for suspecting any individual approached except for his or her race, attempted to stop, question, and physically inspect the hands of any and every non-white person in and around the City of Oneonta. Second Amended Complaint, at page 4, lines 1-5.

Also not mentioned by the panel is that the breadth of the sweep allegedly was no accident. For, as is further asserted by the plaintiffs, "the objective, as defendant Chandler [the State Police Investigator in charge of the probe] told the newspapers *Newsday* and the *Oneonta Daily Star,* was to try 'to examine the hands of all the black people in the community.' " Second Amended Complaint, at page 30, ¶ 100.

In other words, according to the plaintiffs' allegations, on the basis of a victim's statement that her assailant was a *young black male,* the police in Oneonta, instructed by Chandler, decided to stop and question (a) every male black student at SUCO, *regardless of age;* (b) every non-white person they could find in the City of Oneonta, *regardless of age or sex;* and (c) at least one black *woman* named Sheryl Champen, who has joined this suit as a plaintiff.

Because the district court dismissed the plaintiffs' complaint on a 12(b)(6) motion, *all* of these facts, and any others that may be shown in support of the allegations, *must* be

taken as true, *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130, 138 (2d Cir.1999), unless they are fanciful or delusionary, or, if instead of facts, they represent only legal conclusions. *See Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir.1998) ("[B]ald assertions and conclusions of law are insufficient" to survive dismissal.); *cf. Contemporary Mission, Inc. v. United States Postal Serv.*, 648 F.2d 97, 107 n. 14 (2d Cir.1981) (permitting summary judgment if the plaintiff adduced only facts that were "fanciful, frivolous, gauzy, spurious, irrelevant....").

II

The plaintiffs brought suit claiming that the defendants' behavior contravened the Equal Protection Clause of the United States Constitution.[1] The district court thereupon granted a

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[1] Some of the plaintiffs also alleged violations of the Fourth Amendment. I believe that the panel opinion's handling of the Fourth Amendment claims of Jamel Champen and Ricky Brown is in direct conflict with the law of two circuits, *see Gardenhire v. Schubert*, 205 F.3d 303, 314 (6th Cir.2000); *McGann v. Northeast Ill. Reg. Commuter R.R.*, 8 F.3d 1174, 1186 (7th Cir.1993), and highlights an apparent conflict within our own circuit.

The issue raised by these cases concerns when a court and when a fact- finder should determine whether a reasonable person would conclude that he or she was free to leave while being questioned by the police. In *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir.1991), we indicated that "freedom to leave" was generally a legal question to be

(continued...)

[1](...continued)
decided by a court. In *Posr v. Doherty*, 944 F.2d 91, 99-100 (2d Cir.1991), we suggested, instead, that it was usually a fact issue for the jury. The revised panel opinion says that, actually, the question is a mixed one of law and fact. *See* 221 F.3d at 340 ("Whether a seizure occurred is a question of law to be reviewed *de novo*, while the factual findings underlying that determination are reviewed for clear error."). Fair enough. But that statement does not explain whether the *reasonableness* of a questioned person's belief as to his or her freedom to leave is one of the underlying *factual* findings or is, instead, part of the *legal conclusion*.

In an earlier, now vacated, opinion the current panel treated "reasonableness" as part of the legal conclusion, and found against the plaintiffs. In the present opinion, the panel still treats it as "law," but finds for the plaintiffs. The new *result* may be more nearly correct on the facts but it may well be wrong on who is the proper decision maker. Treating reasonableness as a legal conclusion is not only in conflict with decisions of other circuits (*see supra*) but is also inconsistent with much other closely related law. *See, e.g., United States v. Tehrani*, 49 F.3d 54, 58 (2d Cir.1995) (the "point [at which] a permissible investigative detention ripens into an arrest is a question of fact"); *Tenenbaum v. Williams*, 193 F.3d 581, 605 (2d Cir.1999) ("[a] jury could reasonably conclude" that a person of reasonable caution would have believed that the seizure at issue was not justified), *cert. denied*, 529 U.S. 1098, 120 S.Ct. 1832, 146 L.Ed.2d 776 (2000); *see also DeMarco v. Sadiker*, 952 F.Supp. 134, 140 (E.D.N.Y.1996) (relying on *Posr* in a different, but not

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12(b)(6) motion to dismiss. But, as the panel acknowledges, it did so on an erroneous theory. The lower court believed, incorrectly, that in order to state an equal protection claim plaintiffs were required "... to plead the existence of a similarly situated group of non-minority individuals that were treated differently in the investigation of a crime."[2] Accordingly, after giving plaintiffs an opportunity to amend their pleadings to make such an allegation (which plaintiffs were unable to do), it dismissed their amended complaint.

As the panel properly notes, however,

> There are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause. A plaintiff could point to a law or policy that "expressly classifies persons on the basis of race." [*Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir.1999)] (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213, 227-29, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). Or, a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally

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[1](...continued)
unrelated, situation). At the very least, greater clarity on this point, both in terms of our circuit's own law and in terms of our law's relation to that of other circuits is sorely needed.

[2] It is not surprising that the district court erred in this way, given the fact that the parties had not argued the theory of the case that I discuss below.

> discriminatory manner. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). A plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Johnson v. Wing*, 178 F.3d 611, 615 (2d Cir.1999).

221 F.3d at 337. And, as the panel also says, plaintiffs are therefore correct "that it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification. These classifications are subject to strict judicial scrutiny, *see Able v. United States*, 155 F.3d 628, 631-32 (2d Cir.1998)." *Id.*

Accordingly, the issue before the panel was: Did the plaintiffs adequately plead that state officials imposed a constitutionally suspect classification? It is this question that the panel, in my view, fails adequately to answer. For, instead of considering, on the facts that we must take as true, whether the police *created and acted upon a racial classification by setting aside all but the racial elements in the victim's description*, the panel examines the purely hypothetical question of whether, *had the police acted on the victim's description*, such behavior would have imposed a racial classification. *See id.*

It follows that the panel's answer to this question is irrelevant to deciding the controversy actually before us. That

controversy, not addressed to any significant degree by the panel, remains the following: Is the state creating an express racial classification that can only be approved if it survives strict scrutiny when state officers (like the police) ignore essentially everything but the racial part of a victim's description, and, acting solely on that racial element, stop and question all members of that race they can get hold of, even those who grossly fail to fit the victim's description? The answer to that question, all but ignored by the panel, seems to me--both on the precedents and on plain logic--to be a resounding yes.[3] *See, e.g., Adarand Constructors, Inc. v. Pena*,

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[3] I do not, of course, mean to suggest that any seeming police deviation from a victim's description constitutes the creation of a racial classification. If the police question those people in a racially defined group who range from, say, 5'10" to 6'2", on the basis of a victim's description of a 6' tall man "of that race," such behavior could hardly be termed a deviation. And, there is no reason for the police to be tied to elements in a victim's description that are readily alterable within the relevant time frame. Thus if the description includes a red bandana, which can quickly be ditched, it would be absurd to limit the police's questioning to those with red bandanas. Other attributes (trousers, facial hair, even color of hair) are also readily alterable, but only if the time period is long enough. As a result, whether the police focused on the racial elements in the victim's description and ignored the others, thereby creating a racial classification, frequently will depend on the time period and circumstances involved.

Similarly, and more important, even seemingly

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515 U.S. 200, 235, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *Saenz v. Roe*, 526 U.S. 489, 505, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (holding that where the right "to be treated equally" is at stake, "discriminatory classification is itself a penalty"); *see also Hayden*, 180 F.3d at 48; *Able*, 155 F.3d at 631-32.

If I am correct, then the only way in which it can be said that plaintiffs have not sufficiently pleaded a violation of the equal protection of laws is if they have failed to allege facts that, if proven, would show that the police of Oneonta discounted the non-racial elements in the victim's description while focusing, instead, solely or predominantly on the fact that

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[3](...continued)
permanent attributes can be disguised. And if there were evidence that the perpetrator had (or was likely to) disguise his sex, or age, these attributes could also be discounted by the police. But "race" too can be disguised. Thus, unless the police are operating on the basis of stereotypes, or unless there is actual evidence to the contrary, there is little reason for the police to assume that the perpetrator disguised his or her gender or age, rather than race, and as a result, proceed to question only those who fit the racial description.

In any event, no such issues are plausibly before us in this case. And, even if they were, it would be extremely unlikely that they would justify a 12(b)(6) dismissal since the reasons justifying the deviation would generally be best examined on the basis of affidavits or other factual submissions.

the perpetrator was black. It is, therefore, to the adequacy of the plaintiffs' pleadings--again virtually unexamined by the panel opinion--to which I turn.

III

That the facts pleaded are adequate seems to me manifest. In addition to the allegation--acknowledged by the panel--that the police stopped at least one woman; the Second Amended Complaint states at page 4, lines 1-5:

> During the "sweep," which occurred over a five day period, the officials, without any basis for suspecting any individual approached except for his or her race, attempted to stop, question, and physically inspect the hands of any and every non-white person in and around the City of Oneonta.

And as the complaint says at page 30, § 100, the *objective* of the sweep as described by the head state police investigator was " 'to examine the hands of all the black people in the community.'"

Furthermore, the Second Amended Complaint, on page 3, alleges that the "defendants law enforcement officials ... obtained ... a list containing the name ... of all the male African-American students of SUCO [and] then sought out, approached, questioned, seized, and/or searched every person on that list." Like the prior allegations, this assertion forms a proper basis for proving that the defendants ignored the victim's description and focused almost exclusively on its racial

elements. (This will be so if plaintiffs demonstrate--what may well be the case--that *some* African-American students at SUCO, a state college after all, were not *young*.)

If words mean anything, these statements in the pleading, which are unequivocal and non-conclusory, support precisely the claim that the police went beyond the victim's description and created their own racial classification.[4] The complaint, moreover, nowhere contradicts any of the foregoing factual assertions

The only way, therefore, that the plaintiffs' allegations could be deemed inadequate would be if these pleadings, these facts, could be termed "bald" or "fanciful." That they are neither is, however, demonstrated by the panel's own account, "... the police conducted a 'sweep' of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended" [while] "[f]ewer than three hundred blacks live in the town."

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[4] *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (holding that "a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief") (emphasis added); *Charles W. v. Maul*, 214 F.3d 350, 357 (2d Cir.2000) (citing *Conley*).

Since it is extremely unlikely that out of "fewer than three hundred blacks" (apart from black SUCO students who had already been questioned), more than two hundred were young males, it is anything but fanciful or bald to suggest, as the complaint expressly claims, that the police questioned virtually all blacks they could find, and intentionally did so regardless of age and sex. Let me be clear: I am not saying that the complaint *alleges* this demographic data. It doesn't need to. It alleges facts as to police behavior that, if proven, support a finding that the police went beyond the victim's description and created their own racial category. That is enough to get by 12(b)(6),[5] unless the factual allegations are so fanciful that the court can ignore them. What the conceded demographic data do is to make clear beyond peradventure that the plaintiffs' assertions, far from being unlikely or fanciful, may well be true.

IV

How, then, can it be that allegations adequate to mandate the denial of a 12(b)(6) motion were deemed to be lacking? The only possibility that comes to mind is plainly wrong. The plaintiffs did not assert the *specific legal theory* on the basis of which the facts alleged would, if proven, constitute a violation of equal protection law (unless defendants' actions survived strict scrutiny). That is, the plaintiffs did not articulate

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[5] I am not, of course, assuming that the facts alleged will turn out to be sufficient to convince a jury, or even to avoid summary judgment. But they *are* more than enough to survive dismissal on 12(b)(6).

the following *legal conclusion*: "The facts alleged show that the police went beyond the victim's description and therefore created a racial classification." But, as is universally recognized, plaintiffs are required to plead *facts* not legal theories. It follows that a statement of a specific legal theory is in no way needed for a pleading to survive a 12(b)(6) dismissal motion. *See Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir.2000) (citing *Marbury Mgt., Inc. v. Kohn*, 629 F.2d 705, 711 n. 4 (2d Cir.1980)). As a result, the plaintiffs' failure to articulate the precisely correct theory cannot justify the panel's reaching out to propound its view of what the law would be if (contrary to the facts that must be taken as true) the police had followed the victim's description.

The failure of the plaintiffs to articulate the race classification theory, however, does raise the possibility that, were we to go *in banc*, the plaintiffs might disavow that theory, and the *in banc* would then collapse. This failure, while it does not make the panel decision less egregious, could, for this reason, perhaps form the basis for a decision not to rehear that opinion *in banc*. But if this were the ground for declining to correct the panel's errors *in banc*, it would become essential to remand the case to the district court, so that the plaintiffs could clarify their position by amending their complaint. Such a remand would, of course, make totally unnecessary any legal pronouncements on what the law would be if the police had followed the victim's description.

This approach would have several advantages, apart from obviating the need for this dissent. First, it would demand of the plaintiffs that they make clear the link between the facts they alleged and the above mentioned legal theory (which is the

one most proximately supported by these facts). This would helpfully tie the facts to the theory without risking the possibility of a misfired *in banc*. And second, it would recognize that (even on the contrary- to-fact assumption that the plaintiffs' original pleadings were inadequate to support their equal protection claim) the plaintiffs nonetheless deserve an opportunity to make their pleadings good.

On our precedents, plaintiffs are regularly and properly given at least one chance to amend their complaint in response to a district court's finding of inadequacy. *See Branum v. Clark*, 927 F.2d 698, 705 (2d Cir.1991) (court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated); Fed.R.Civ.P. 15(a) (leave to amend "shall be freely given when justice so requires"); *Tarshis v. Riese Org.*, 211 F.3d 30, 39 (2d Cir.2000) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167-69, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)) (stating "the policy of liberally construing civil rights complaints"); *Mian v. Donaldson, Lufkin & Jenrette Securities Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993).

Here the plaintiffs were seemingly offered such an opportunity. But the "chance" that they were given was in fact totally useless. The district court said to the plaintiffs, "Amend to allege that others like situated were treated differently." It did not say, "Your allegations are insufficient to support a finding that the police ignored large parts of the victim's description and in doing so created a racial classification. Amend to allege facts that, if proven, would show this." The district court was not, of course, under any obligation to point

plaintiffs in the direction they needed to go. But it should not have told them both to go in the *wrong* direction and that this was the *only* direction available.[6] It follows that, even if the facts pleaded were deemed insufficient to assert a racial classification, the plaintiffs were owed the opportunity to assert additional facts that, if proven, would be sufficient.

Nevertheless, the panel declined to require that such an opportunity to replead be given.[7] All the panel did was to allow the district court to *consider* permitting repleading. (*See*, footnote 9 of the panel opinion which states, "To the extent that this opinion clarifies equal protection law, the district court is free on remand to entertain a motion to replead. We express no opinion on the merits of any such motion.") I will have more to say about the, not insignificant, effect of that footnote in a later part of this dissent. At the moment, however, it is enough to state that the failure to require that the plaintiffs be allowed to make a further amendment constitutes a serious deviation from correct practice that, by itself, would justify a rehearing *in banc*.

V

More broadly, two fundamental problems with the panel's opinion justify *in banc* review. First, the panel errs in avoiding the critical issue that the plaintiffs' factual allegations

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[6] Again, what the district court did was quite understandable. *See supra* note 2.

[7] Contrast, in this respect, the concurring opinion of Judges Sack and Katzmann.

have raised--the creation in this case of a racial classification as a result of police deviation from the victim's description. Second, that deficiency is compounded by the panel's reaching out to decide the highly divisive, and, it seems to me, unripe, question of whether and when *following* a victim's description is acceptable. Converting what would otherwise be *dicta* into what sounds like a statement of law is almost always undesirable. In the circumstances before us, it is especially unfortunate.

Why is this so? The first reason is that by doing this, the panel prematurely legitimates actions that--even if they might ultimately be deemed valid--are, as the panel itself recognized, extremely offensive to a much abused part of our population. *See* 221 F.3d at 339. However many heartfelt apologies the panel makes for doing so, this cannot help but hurt. If, as the plaintiffs alleged, the police did not merely follow the victim's description in questioning every male black student and two thirds of all of the black residents of the City of Oneonta, I should have thought it wise for the court to welcome the opportunity these allegations gave it to avoid having to tell African-Americans that we are sorry, but you just have to put up with racially linked sweeps when victims--perhaps influenced by their own racial fears, or by our country's long history of racial divisions--give an essentially racial description.[8]

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[8] There can be little doubt that *what* descriptions are given, among many possible ones, reflect a country's underlying biases. Thus in Italy after the Fascist racial laws were passed in 1938, people, for the first time,

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But there are also other, structural, reasons why the panel's, to me unnecessary, validation of the police sweep is particularly undesirable. The question of when, if ever, merely following a victim's description that is predominantly racial might violate equal protection norms is an extremely difficult one. A couple of examples will suggest why. Suppose an armed robbery occurs in which the victim cuts the arm of the robber. The robber, described by the victim in racial terms, runs into a crowded bar where there are only three others who could be so described. Is it wrong for the police to ask the four to show whether they have a cut on their arm? Of course not. But imagine, instead, that a passer-by sees someone illegally swimming naked in a park pond and describes the swimmer to the police in racial terms, adding that the swimmer can readily be identified because he has a distinctive tattoo on his posterior. Can it possibly be acceptable for the police to ask every male in town who fits that racial description to strip, even if the police do so with utmost politeness and in full conformity with Fourth Amendment strictures? I would certainly think not.

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[8](...continued)
came to be described in all sorts of police situations as "Jewish looking." Similarly, at the time of the Palsgraf case, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), police stated that some of the parties involved were "probably Italians." "Bomb Blast Injures 13 in Station Crowd," *N.Y. Times,* Aug. 25, 1924. Today, we don't generally describe people that way. But we do say "black," "Hispanic," etc. That this is so does not necessarily mean courts can forbid the police from acting on such descriptions. It should make us reluctant, however, prematurely to approve of such actions.

In between these examples there are any number of permutations involving, among other things, (a) the seriousness of the crime; (b) the number of people in the racially defined group who are subject to questioning; (c) the significance and extent of *non*-racial attributes given by the victim in addition to the racial one; (d) the capacity of the victim to describe the perpetrator in non-racial (as well as in racial) terms; (e) the effort, if any, by the police to elicit from the victim such non-racial descriptions; (f) the intrusiveness of the questioning; and (g) the special indignity (arising from the existence of stereotypes) that may result from connecting those in a given racial group with a particular type of crime.

Given the complexity of this issue, courts should surely avoid premature judicial pronouncements of validity (or invalidity).[9] In this respect, the revised panel opinion is an

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[9] I would argue, just on the basis of what it told the district court in footnote 9, that the panel was obligated to avoid making these pronouncements. The footnote makes it possible that the case before us will ultimately be concluded without regard to any rules dealing with police behavior that merely follows victims' descriptions. This being so, there was no need in the current appeal to make any pronouncements on that issue. This is especially true since the pronouncements involve constitutional questions that, under our precepts, courts are to avoid deciding unless it is necessary to do so. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); Horne v. Coughlin, 191 F.3d 244, 246 (2d Cir.1999).

enormous improvement over the previous panel decision, *Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir.1999), now happily vacated. Whereas the earlier version seemed to say that any kind of police behavior that followed a victim's description was valid (unless expressly motivated by racial *animus*), the revised opinion seeks simply to approve police actions *in this specific case*. (It does so, of course, by improperly assuming that the police actually followed the victim's description.) The fact that the crime here was a serious one, and that the victim's description was not solely racial, makes the court's statement, though still unnecessary, less harmful. But harmful it remains.

VI[10]

Determining where, if anywhere, a court should draw the line between acceptable and unacceptable police behavior in such a morass would be very hard, even in the best of circumstances. It is made yet more difficult by the fact that the legal categories courts currently have available are utterly unsuited to the task. We can leave to one side the properly forbidden instances of behavior motivated by racial *animus*, because we can assume that at least in most cases the police would be able to point out that their object was to catch the perpetrator and not to discriminate. Similarly, the question of whether the same action would have been taken if the racial description had been of a member of a more favored "racial" group, will (as the panel opinion demonstrates all too well) rarely be helpful in drawing appropriate lines. And so we are

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[10] Judges Parker and Sotomayor, while joining all the other parts of the opinion, do not join this section.

left only with the possibility that, perhaps sometimes, following a victim's racial description can, without more, constitute a racial classification, and as such might be subject to strict scrutiny. But that possibility also turns out to be of little help.

The problem is that the strict scrutiny criteria developed by the Supreme Court are much too blunt. If an action is deemed a racial classification, it is very difficult, under the Supreme Court precedents, ever to justify it. And, were such justification made easier in cases of police following a victim's description, the spillover to other racial classification contexts would be highly undesirable. In other words, were the requirements of strict scrutiny to be relaxed in the police/victim's description area, it would be hard indeed to keep them from also being weakened in other areas in which racial classifications ought virtually never to be countenanced. If, instead, following victim racial descriptions by the police were not deemed to be, at least potentially, racial classifications, there would be no constitutional impediment on police sweeps to identify, say, even the racially described naked swimmer.

For these, and other similar reasons, courts should recognize severe limitations on their competence to deal with victim racial descriptions. But limitations do not mean impotence, they mean that courts ought to be reluctant to act alone. Rather, courts should encourage legislatures to develop guidelines for this area. Such legislative guidelines could make nuanced distinctions between what is needed and acceptable

police behavior, and what is not.[11] Courts could then both enforce those guidelines, and if a jurisdiction made distinctions that were inadequately sensitive, perhaps even strike some of them down.

My point is simply this: If courts give a blank check and broadly legitimate police behavior when it consists of blindly following victims' descriptions that are predominantly racial, legislatures are very unlikely to step in. If, instead, courts try to define, on their own, what is acceptable and what is not, they will probably botch the job terribly. Neither approach is as likely to be as good as one that would derive from a dialogue that could be developed between courts and legislatures.[12]

By speaking at all when it did not need to, the panel both makes legislative intervention less likely and guides that intervention--were it to occur-- prematurely and hence improperly. How much better it would have been, therefore, had the panel taken note of the fact that the plaintiffs'

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[11] Legislatures could, for example, if they deemed it appropriate, require the police to request that a victim or witness, who had given a solely racial description, answer questions seeking to elicit significant non-racial attributes of the perpetrator. Defining such detailed requirements--*Miranda*, to the contrary notwithstanding--is not generally something courts do well, but it fits squarely within the competence of legislatures.

[12] For these purposes, when I say legislatures I presuppose involvement of the relevant executives as well.

allegations made this case one in which the police did not merely follow a victim's description, but instead created their own racial category. The panel would then have reversed the district court while, at the same time, pointing out the difficulties that courts face with respect to situations in which the police do no more than follow victims' descriptions. Had it done this, the panel would not only have not needed to tell African-Americans that, sorry as *we* are, *you* must put up with demeaning treatment, it would also have furthered a legislative/judicial dialogue that, precisely because it would involve participation by, among others, African-Americans and the police, would have some hope of developing effective and non-hurtful ways of dealing with a very hard problem.[13]

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[13] In answer to all this, Chief Judge Walker and Judge Jacobs seek to make four points. I believe that all of them are incorrect.

They first suggest that the Fourth Amendment is sufficient to protect citizens from discriminatory police behavior and, hence, that applying any equal protection review to police investigations is superfluous. Relatedly, they claim that even highly limited equal protection review would have dire consequences. But any argument that the Fourth Amendment could possibly suffice depends, I think, on two propositions, never mentioned, let alone accepted, in the concurring opinions: that where there is a seizure (like a *Terry* stop) one of the things that must influence whether that seizure is reasonable under the Fourth Amendment is the presence or absence of racial considerations with respect to the seizure; and further, that such a determination of reasonableness in cases of racial classification is at least open

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to the application of strict scrutiny criteria akin to those of equal protection. Unfortunately, these assumptions appear to be precluded by the Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), which not only makes the motive of the officers involved irrelevant but suggests that the Equal Protection Clause and not the Fourth Amendment is the appropriate basis for objection when seizures "based on considerations such as race" occur. *Id.* at 813, 116 S.Ct. 1769.

In any event, even with these assumptions, the Fourth Amendment seems to me manifestly inadequate to deal with the underlying problem. There are, for example, in a society with deep racial divisions, any number of police intrusions on citizens that do not amount to *Terry* stops or to other forms of searches and seizures cognizable under the Fourth Amendment, but that are, nonetheless, immensely hurtful. Some of these may be necessary in order to control serious crimes. Other intrusions, however, because they are not needed to apprehend the perpetrators of such crimes, or because they deal only with trivial violations, cannot be countenanced under our Constitution. *See supra* at 781-82 n. 3, 785-86. And yet, because no searches or seizures are involved, the Fourth Amendment cannot preclude them. As a result, excluding even a minimal consideration of equal protection when reviewing police behavior in such cases, far from protecting society from dire consequences, treats every conceivable interest of law and order, however insignificant, as if it were necessarily more important than any interest in not being categorized on the basis of race. And that seems to

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me clearly untenable.

Second, they state that the police in this case could not possibly have ignored all but the racial elements in the victim's description because to do so would have been stupid. But that is precisely what the plaintiffs alleged in their complaint (and adduced evidence to support). And--quite apart from the fact that racial stereotyping leading to blatantly stu
pid behavior is far from unknown in our society, even, I expect, among the police--for the concurrers to disbelieve these allegations is to violate the most elementary rules of decision with respect to 12(b)(6) dismissals.

Third, Chief Judge Walker and Judge Jacobs claim that the equal protection theory discussed in this opinion is both unheard of and academic. But, in fact, as we all know, the suspect nature of racial classifications is thoroughly grounded in the Supreme Court's and in this court's precedents. *See, e.g., Whren*, 517 U.S. at 813, 116 S.Ct. 1769 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."). Moreover, the application of racial classification jurisprudence to the particular facts of this case can be found fully in what was argued to us, most cogently in the *amicus* brief in support of the plaintiffs. *See* Memorandum of *Amici* NAACP Legal Defense & Educational Fund, Inc., New York Civil Liberties Union, and Center for Constitutional Rights in Support of Petition for Rehearing with Rehearing *En Banc*. Since it is conceded that *theories* do not have to be stated in the

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VII

Blessedly,[14] this case is far from over. In footnote 9, the panel opinion invites the district court to consider allowing repleading. If the proverbial wink in fact turns out to be as

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[13](...continued)
complaint, and--given that the facts alleged may, if proven, demonstrate a violation of equal protection under the theory presented by *amici*--it seems clear that that theory should, at least, be considered by the district court at the 12(b)(6) stage.

Finally, the concurrers assert that a racial classification is not necessarily created every time the police question someone who does not fit the victim's description of the perpetrator. After all, the police may only be searching for witnesses and not suspects. Of course. But one must also ask why, in the case before us--according to the allegations that we are required to take as true--all of these so-called witnesses were black, and all were asked to show whether they had the incriminating cut on their wrist.

[14] In this respect, I note that a majority of the twelve currently active judges of our court do not wish this case to be treated as ended. Five judges (Judges Kearse, Parker, Straub, Sotomayor, in addition to me) have voted in favor of a rehearing *in banc,* and two judges (Judges Sack and Katzmann), while voting against a rehearing *in banc,* have stated unequivocally that they believe the district court should permit the plaintiffs to amend their complaint. *See* opinion of Judges Sack and Katzmann concurring in the denial of the rehearing *in banc, ante* at 779.

good as a nod, the district court will permit a new amended complaint (as I believe it must do). That revised complaint could tie the facts alleged to the specific theory that an equal protection violation here occurred because the police created their own racial classification by deviating in an impermissible way from the victim's description.

It might then happen, if plaintiffs are able to support the facts they allege sufficiently to avoid summary judgment, that the case would proceed to trial. The result of such a trial could be that--except for its uncontroversial recognition that a *prima facie* violation of the Equal Protection of the law that is subject to strict scrutiny occurs when a racial classification is created by state action--everything the panel said would be of little significance. And the panel opinion would end up being no more than a minor footnote to a case decided on other grounds.[15]

CONCLUSION

It may be, therefore, that our failure to go *in banc* will ultimately not have serious consequences; 'tis a consummation devoutly to be wish'd. At the moment, however, we are faced with a panel opinion that, (a) though less bad than its prior version, now happily vacated, still makes unnecessary, and inevitably hurtful, remarks about when following victims' descriptions involving race is constitutionally permissible; (b) does this by ignoring pleadings that are manifestly sufficient under our 12(b)(6) jurisprudence; and (c) additionally, does it

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[15] *See* note 7 *supra.*

by refusing to require the district court to permit further pleadings despite the fact that earlier repleadings were in response to an incorrect statement of the law by the district court. These errors, moreover, are egregious, and are made in a case that directly involves issues that most searingly divide our society. When such issues are incorrectly dealt with by a panel of our court, an *in banc* rehearing is, to my way of thinking, not only justified but essential. For that reason, I respectfully dissent from the denial of *in banc* review.

STRAUB, Circuit Judge, with whom CALABRESI, Circuit Judge, joins, dissenting from the denial of rehearing in banc:

I respectfully dissent from the denial of rehearing *in banc*. This case presents "exceptional[ly] importan[t]" questions of constitutional law, Fed.R.App. P. 35(a)(2), concerning the manner in and degree to which police investigations that rely upon predominantly racial descriptions given by witnesses are to be scrutinized under the Fourteenth Amendment and the Ku Klux Act of 1871, 17 Stat. 13 (codified at 42 U.S.C. § 1983). The panel reaches a grave conclusion by holding that the police act constitutionally under the Fourteenth Amendment when, based on a witness's predominantly racial description, they stop every young African American male in town to determine whether he can exclude himself from a vague class of potential suspects that has been defined in

overwhelmingly racial terms.[1] Even counsel for the defendant-appellees--who *won* this appeal before the panel--seems to

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[1] Chief Judge Walker observes that "there have been times and places in this country in which the police have tolerated crime in African American communities." *Ante* at 771 (Walker, C.J., concurring). That statement is true enough. It is equally true, however, that there have been, and continue to be, times and places in this country in which victims have been neither accurate nor innocent in their use of race to describe criminal suspects--witness, for example, the Boston Police Department's wrongful arrest of an innocent man in 1989 for the murder of Carol Stuart, based upon a witness's fabricated description of the suspect as being "a black male in his late 20s or early 30s, about 5 feet 10 inches tall and weighing 150 to 160 pounds," who spoke "in a raspy, 'sing-song' tone." Sally Jacobs & Diego Ribadeneira, *No Wallet, So Killer Opened Fire,* BOSTON GLOBE, Oct. 26, 1989, at 1; *see also* Peter J. Howe, *From Nightmare to Reality, A City is Reeling,* BOSTON GLOBE, Jan. 7, 1990, at 1.

No less than when they rely upon racial classifications of their own making, the police impose tremendous social costs upon people of color when they act primarily upon the race-based suspicion of victims and other witnesses. Indeed, at least one commentator has gone so far as to describe the costs of using race-based suspicion in police investigations as imposing a "racial tax" upon people of color. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 169-63 (1997). The panel pays insufficient heed to *these* social costs.

agree. *See* Bob Herbert, *Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29 (quoting statement by Attorney General of the State of New York that "[w]e won the case, but it makes your skin crawl") (cited in Plaintiffs Appellants' Second Petition for Rehearing with Rehearing *En Banc* at 11). Regardless of whether one agrees with the panel's apparent reading of the complaint or Judge Calabresi's rather different view, the legal questions presented by this case remain exceptionally important, and the panel's conclusion remains quite severe. Indeed, as Judge Calabresi correctly notes, the panel's reading of the complaint actually requires it to tackle a constitutional question even *more* complex (and perhaps, therefore, even more worthy of *in banc* review) than otherwise would have been necessary concerning the manner in which police classifications that rely faithfully upon the descriptions of witnesses are to be reviewed under the Equal Protection Clause. *See ante* at 785 (Calabresi, J., dissenting).

It is far from self-evident that the panel's summary disposition of that novel and complex constitutional question is correct. Regardless of the *source* of their descriptions of suspects, police departments and individual police officers acting under color of law have an independent constitutional obligation to ensure that their *use* of those descriptions comports with the requirements of the Fourteenth Amendment--even if the description they rely upon is faithful to what they have been told by a witness. After all, criminal investigations are conducted by the police, not by witnesses. The witness's description in this case was given to the police as part of *its* process-- "governmental in character," *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 621-22, 111 S.Ct. 2077, 114

L.Ed.2d 660 (1991), and conducted under color of law[2]--of

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[2] In this respect, the panel appears to err by requiring the plaintiffs to point to a "*law or policy* that expressly classifies persons on the basis of race"--which, for the panel, seems to refer only to "established profile[s]" or "regular polic[ies] based on racial stereotypes"--in order to make out a viable claim under the Equal Protection Clause that an express racial classification was used. Brown v. Oneonta, 221 F.3d 329, 337 (2d Cir.2000) (emphasis added and internal quotation marks omitted). "Established profile[s]" and "regular polic[ies] based on racial stereotypes" do not exhaust the universe of possible Equal Protection Clause violations by the police. To the contrary, "any person ... has the right to demand that *any governmental actor subject to the Constitution* justify *any racial classification* subjecting that person to unequal treatment under the strictest judicial scrutiny." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (emphasis added). It is true that claims under section 1983 against government officials in their *official* capacities (or against the City of Oneonta itself) must show that the entity's "policy or custom ... played a part in the violation of federal law." Hafer v. Melo, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). However, the Oneonta defendants also have been sued under section 1983 in their *individual* capacities--and the plaintiffs need not show any connection to government "policy or custom" to support these individual capacity claims. *See* id. at 25, 112 S.Ct. 358. Regardless, therefore, of whether police "policy or custom" played any role in this case, dismissal of the

(continued...)

searching for criminal suspects. The racial classification that the witness's description is alleged to embody could *only* become actionable under the Fourteenth Amendment on account of the police *actually using it,* which the plaintiffs allege that they did.

Contrary to the suggestion of Chief Judge Walker, *see ante* at 773 (Walker, C.J., concurring), the recitation of that basic proposition in this opinion does not "propose" any rule beyond that which the panel itself suggests in its amended opinion--or at least beyond *one* of the two contradictory rules the panel suggests. The panel already has conceded, in its amended opinion, that police officers cannot wholly insulate themselves from equal protection review simply by claiming that the description they used in an investigation came, in the first instance, from a witness. *See Brown v. Oneonta*, 221 F.3d 329, 339 (2d Cir.2000) (suggesting that there may be circumstances in which the police, "when acting on a description of a suspect, violate the equal protection rights of non-suspects, whether or not the police only stop persons conforming to the description of the suspect given by the victim"). With that proposition I fully agree, and in this opinion I do not suggest, much less "propose," anything more. That statement by the panel, however, contradicts a *second* proposition implicit in the panel's original opinion, *see Brown v. Oneonta*, 195 F.3d 111, 119 (2d Cir.1999), and now made explicit in its amended opinion: that because the description

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[2](...continued)
plaintiffs' complaint based on the absence of any "policy or custom" seems inappropriate, given the plaintiffs' explicit assertion of these individual capacity claims.

"originated not with the state but with the victim," *Oneonta*, 221 F.3d at 338, no race-based state action took place *at all* in this case. Notwithstanding this *dicta* in the amended panel opinion, however, the initial source of the police's description of a suspect bears no constitutional significance. It simply is not relevant, one way or another, to the question of whether state action takes place when the police act upon that description, and the panel's disposition cannot plausibly rest on that basis. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

With no support for its suggestion that no state action took place, the panel is left to rely solely on the assertion that the police interrogations of the plaintiffs in this case involved no racial classification at all. *See ante* at 772 (Walker, C.J., concurring). The panel reaches that conclusion by noting that the plaintiffs "were not questioned *solely* on the basis of their race," but based on a description that contained "*also* gender and age, as well as the possibility of a cut on the hand." *Oneonta*, 221 F.3d at 337 (emphasis added). That proposition may appear to be more plausible than the panel's suggestion concerning the presence or absence of state action, but still is not self-evidently correct. The fact that a predominantly racial description given by a witness includes other descriptors does not, by itself, make the description "race-neutral." To be sure, as Judge Calabresi correctly notes, determining whether a witness's predominantly racial description should be deemed to embody an "express" racial classification or a "race-neutral" classification is extremely difficult, and for that reason, the panel should have made an effort to avoid that constitutional

question. *See ante* at 785- 86 & n.9 (Calabresi, J., dissenting); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The panel, however, treats it as no question at all. Clearly, the panel relied upon *some* criteria to determine that the presence of other descriptors (age, sex, and the "possibility of a cut on the hand") was sufficient to render the witness's description--though predominantly racial--"race-neutral." What those criteria are, however, is anybody's guess. Again, contrary to Chief Judge Walker's intimation, *see ante* at 772 (Walker, C.J., concurring), I do not "propose" any rule suggesting what those criteria should be. Insofar as it fails to make explicit its own criteria, however, neither does the panel. And given the importance of the questions at issue in this case, that void in the panel opinion seems to demand *in banc* review, for this Court ought not allow such a severe conclusion to rest on such slender legal justification.

The judges of this Court obviously disagree sharply over the serious and difficult constitutional questions presented in this case, which appear to be of first impression in this Circuit and every other. For that reason alone, if not for any other, this case would seem to demand *in banc* reconsideration. *Cf. Koehler v. Bank of Bermuda (New York) Ltd.*, 229 F.3d 187, 194 (2d Cir.2000) (Calabresi, J., dissenting from the denial of rehearing *in banc*); *McCray v. Abrams*, 756 F.2d 277, 279-80 (2d Cir.1985) (Van Graafeiland, J., dissenting from the denial of rehearing *in banc*). However, because I agree that the plaintiffs' extraordinarily detailed, 94-page complaint more than sufficiently pleads facts in support of a claim that the

police "created and acted upon a racial classification by setting aside all but the racial elements" in the witness's description, *ante* at 781-82 (Calabresi, J., dissenting), I join Judge Calabresi's opinion. I also note that given the majority's decision to deny rehearing *in banc,* I share the view expressed by Judges Sack and Katzmann, *see ante* at 779 (Sack and Katzmann, JJ., concurring), that the District Court should afford the plaintiffs an opportunity to amend their complaint on remand in light of our disposition.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICKY BROWN, et al.

Plaintiffs,

-against- **No. 93-CV-349**

CITY OF ONEONTA, et al.

Defendants.

APPEARANCES:	**OF COUNSEL:**
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MEMORANDUM-DECISION AND ORDER

I. BACKGROUND

In the early morning of September 4, 1992, a 77-year old woman, was allegedly attacked while staying as a guest in the home of a friend outside the City of Oneonta. Based upon the woman's account of the assault, the police suspected the assailant to be a young black male. The New York State Police supervised the investigation, and using dogs, traced the assailant's path to a wooded area at the base of the State University of New York's Oneonta campus (SUCO).

Later on September 4th, Sgt. Shedlock of the Oneonta Police Department contacted Merritt Hunt, a lieutenant with the SUCO Public Safety Office (PSO). Sgt. Shedlock asked Lt. Hunt if SUCO could provide information on black male students to the State Police for purposes of the investigation. Lt. Hunt contacted the Assistant Director of Housing for SUCO who told him such information could be provided. Lt. Hunt also asked John Edmondson, the Director of PSO, to contact Eric Wilson, the Director of the SUCO Computer Center in order to get the information.

On September 4, 1992, Dr. Leif Hartmark, the Vice

President of Administration for SUCO, was assigned to be the "Officer of the Day," the person with authority to act on behalf of SUCO's president in his absence. Dr. Hartmark was first alerted of the assault, in his official capacity, at approximately 2:00 pm on September 4, 1992. Between 3:00 and 3:30 pm Hartmark met with Eric Wilson who informed Hartmark that Lt. Hunt had contacted Wilson requesting a list of all the black male students at SUCO in connection with an official police investigation of an assault in the Town of Oneonta. Allegedly, Wilson emphasized in this meeting that the State Police needed the information by 4:00 pm that day. Wilson allegedly informed Hartmark that SUCO's Public Safety Chief, John Edmondson, was fully informed of the situation and fully authorized release of the list. Although, Dr. Hartmark tried to personally contact Chief Edmondson regarding this matter, he was unable to reach him. Dr. Hartmark also tried to contact Francis Daley, the Vice President of Student Affairs, but was unsuccessful. At approximately 3:30 pm, Dr. Hartmark approved the compilation and release of this list, under his power as Officer of the Day, to SUCO's Office of Public Safety with the understanding that the Officer would release the list to the State Police for use in connection with the assault investigation. As Dr. Hartmark admits, he had no knowledge of how the information would be used by the State Police.

The list generated by the SUCO Computer Center was given to the PSO and was subsequently delivered to defendant Karl Chandler, a State Police investigator. After obtaining this list, the law enforcement officers questioned those individuals on the list in the dorms and at other locations on campus. Law enforcement officials also questioned a number of black persons in and around Oneonta who were not students at

SUCO.

On the prior motions, the Court (1) denied defendant Hartmark's and the State defendants' motion to dismiss the Family Educational Rights and Privacy Rights Act (FERPA) claims against defendants Hartmark, Hunt, and Wilson, and held that they were not entitled to qualified immunity; (2) denied the defendants' motion to dismiss the conspiracy claim under 42 U.S.C. § 1985 based on the alleged violations of FERPA; (3) denied the State defendants' motion to dismiss the plaintiffs' claims under Title VI of the Civil Rights Act; (4) granted summary judgment dismissing all Fourth Amendment claims as against all defendants; (5) dismissed with leave to replead the equal protection claims; (6) dismissed with leave to replead all 42 U.S.C. § 1981 claims as against all defendants; (7) dismissed all conspiracy claims brought pursuant to 42 U.S.C. § 1985 based on the alleged Fourth Amendment and equal protection claims; (8) dismissed all FERPA claims alleged against the State police and Oneonta law enforcement officials; (9) dismissed all claims for intentional infliction of emotional distress; and (10) dismissed the pendent state law claims brought under New York Civil Rights Law § 40-c and New York Personal Privacy Protection Law §§ 91-99.

Plaintiffs filed an amended complaint which has added 27 new named parties who have asserted Fourth Amendment claims and claims under 42 U.S.C. § 1981, in addition to the claims remaining from the previous motions. In addition, the amended complaint added new defendants from the Otsego County Sheriffs department. Finally, plaintiffs repleaded the equal protection and 42 U.S.C. § 1981 claims.

Of the motions now before the Court, (1) the defendant Leif Hartmark has moved for an order dismissing plaintiffs' equal protection claim pursuant to Rule 12(b)(6), or an order declaring that the claim is barred by the doctrine of qualified immunity; (2) the city of Oneonta defendants have moved pursuant to Rules 12(b)(6) and/or 56 claiming that a) certain claims are barred by the law of the case pursuant to this Court's previous decisions, b) the Fourth Amendment claims are insufficiently pleaded, c) plaintiffs' equal protection, 42 U.S.C. §§ 1981, 1985, 1986, and Title VI claims fail to state a claim, d) the conspiracy claim against the Oneonta police officers should be dismissed, e) the individual Oneonta officers are entitled to summary judgment based on qualified immunity, and f) all claims against the city of Oneonta should be dismissed; (3) the New York State defendants have moved pursuant to Rules 12(b)(6) and/or 56 for substantially the same relief as the Oneonta defendants.

II. DISCUSSION

A. Law Of The Case

Defendants allege that plaintiffs have repleaded and have sought to relitigate claims that were dismissed by this Court's decisions on the previous motions in this case. It is the defendants' contention that the "law of the case" doctrine should be applied to the present motions and prevent reconsideration by this Court of issues upon which it has already decided.

"The law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to

govern the same issues in subsequent stages in the same case'" DiLaura v. Power Authority of N.Y., 982 F.2d 73, 76 (2d Cir.1992) (citations omitted). Reconsideration of a prior decision is discretionary, and the factors that generally compel reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Virgin Atlantic Airways Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.), cert. denied, 113 S.Ct. 67 (1992) (citation omitted). Moreover, the Court notes that the Local Rules provide a mechanism for seeking the reconsideration of a decision of this Court. See, L.R. 7.1(g). Accordingly, the Court is disinclined to reconsider a prior decision unless plaintiff has made a proper showing.

In this instance, plaintiffs have made no showing that the controlling law relevant to the issues presented has changed, that new evidence has been uncovered, or that justice plainly warrants reconsideration. Thus, the Court reaffirms its prior holdings with respect to this case as to the issues that the parties may seek to relitigate. In particular, the Court will not revisit its (1) denial of defendant Hartmark's and the State defendants' motion to dismiss the Federal Education and Privacy Rights Act (FERPA) claims against defendants Hartmark, Hunt, and Wilson, and holding that they were not entitled to qualified immunity; (2) denial of the law enforcement defendants' motion for summary judgment on the basis of an alleged qualified immunity; (3) denial of the defendants' motion to dismiss the conspiracy claim under 42 U.S.C. § 1985 based on the alleged violations of FERPA; (4) denial of the State defendants' motion to dismiss the plaintiffs' claims under Title VI of the Civil Rights Act; and (5) grant of

defendants' summary judgment motion dismissing all Fourth Amendment claims as alleged by the then plaintiffs.

B. Standards On A Motion To Dismiss Pursuant To Rule 12(b)(6) Or For Summary Judgment Pursuant To Rule 56

On a dismissal motion for failure to state a claim the general rule is that the allegations in a plaintiff's complaint are deemed to be true and must be liberally construed in the light most favorable to the plaintiff. Dahlberg v. Becker, 748 F.2d 85, 88 (2d Cir.1984) cert. denied 470 U.S. 1084 (1985). A complaint should not be dismissed unless it appears beyond a reasonable doubt that the plaintiff cannot in any way establish a set of facts to sustain her claim which would permit relief. Hughes v. Rowe, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980); Bass v. Jackson, 790 F.2d 260, 262 (2d Cir.1986).

If on a motion made pursuant to Rule 12(b)(6) "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56 ..." Fed.R.Civ.P. 12(b)(6). A motion for summary judgment should be granted "if the pleadings ... together with the affidavits, if any, show that there is no genuine issue as to any material fact ..." Fed.R.Civ.P. 56(c). There must be more than a "metaphysical doubt as to the material facts." Delaware & H.R. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir.1990) quoting Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). All ambiguities must be weighed in favor of the non-moving party. Ramseur

v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir.1989). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.1991) cert. denied, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991). The parties to this motion have submitted affidavits with exhibits to the Court. Thus, the Court will, where necessary, treat these motions as if for summary judgment pursuant to Rule 56 and apply the foregoing standards.

C. Fourth Amendment Claims

As to the Fourth Amendment claims, the Court will consider only those 27 new plaintiffs who were not parties to the action in the previous motions.[1]

All personal interaction between law enforcement officers and individual citizens cannot be said to involve seizures. In order to state a claim for relief under the Fourth Amendment, the plaintiffs are required to show that an unreasonable search and seizure occurred. "[O]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 20 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968). The Supreme Court later explained that a seizure has occurred only

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[1] Ricky Brown, Jamel Champen, Sheryl Champen, Hopeton Gordon, Jean Cantave, and Raishawn Morris were parties to the prior motion and are bound by the law of the case, as decided previously by the Court.

when, in light of all the circumstances surrounding the incident, the reasonable person would not feel free to leave. United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). Under the applicable standard, "a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877. Examples of a show of authority which could indicate a seizure are "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877. However, the Court is mindful that "[e]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual." Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991).

The plaintiffs now claim that 27 additional individuals were deprived of their Fourth Amendment rights to be free from unreasonable search and seizure by the named Oneonta Police Officers, SUCO Public Safety Officers, and State Police Officers, and all other unidentified officers of these three organizations. The allegations of Fourth Amendment violations, set forth in the second amended complaint, generally are vague and conclusory. The Court finds that only 5 plaintiffs: Darnell Lemons, Ronald Jennings, Felix Francis, Vincent Quinones, and Laurence Plaskett have alleged a claim that can survive a motion to dismiss. Thus any Fourth Amendment claims by other persons must be dismissed.

The Court finds that as to the 5 plaintiffs who have set forth a viable Fourth Amendment claim, those claims must be dismissed as to the State Police defendants Chandler, Ferrand, Way, Ferago, More, Kimball, and Grant. These defendants have submitted affidavits that indicate that they never had personal contact with any of the 27 newly named plaintiffs in connection with this case. Plaintiffs have set forth no facts to the contrary. Similarly, as to defendant Oneonta Police officers Redmond and Olsen the Fourth Amendment claims must fail. Summary judgment must be granted in their favor because they have stated in affidavits that they were not on duty and did not take part in the conduct pertaining to any cause of action in this case.

In the case of Darnell Lemons' encounter with the police, according to the allegations in the second amended complaint, although the police officers stopped Mr. Lemons as he was walking away from them, the officers only asked him questions, and he complied. Therefore, it is not possible to find this situation was a seizure. Accordingly, summary judgment is proper.

In the case of Ronald Jennings, while a passenger in a car, he was asked to get out of the car by two state police officers. Mr. Jennings was then "frisked." Mr. Jennings was not given an explanation until after being searched by the officer. As stated in Terry v. State of Ohio, a search in the absence of probable cause for an arrest must "be strictly circumscribed by the exigencies which justify its initiation." 392 U.S. 1, 26, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889 (1968). The remaining State Police defendants have set forth no facts showing that the search was objectively reasonable such that

the invasion of an individuals privacy was justified. See, Terry, 392 U.S. at 18-19, 88 S.Ct. at 1878-1879. In accordance with the standards set forth in Terry and Mendenhall, the Court finds that there is a material question of fact as to whether the search was objectively reasonable, and as to whether a reasonable person would have believed that he was not free to leave. Given these circumstances, the court denies State Police defendants Wilson, Jackson, Hunt, and Clum's motion as to the Fourth Amendment claim of Ronald Jennings.

In the case of Felix Francis, a police officer asked him to show his bare arms boarding a bus. He complied with this request and was allowed to board the bus. The second amended complaint contains no allegations of a show of authority or physical force, and thus no seizure occurred. Thus, summary judgment should be granted.

Vincent Quinones has alleged that on a second encounter with the police relating to the police's efforts to check the hands and arms of young black males, he declined to show his arms and stated that he had already done so earlier. Mr. Quinones then alleges that the police threatened him with being brought to the police station if he did not comply with their request. The Court finds that a reasonable person could have believed that he was not free to leave or that compliance was compelled. See, Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877. Thus, as to State Police defendants Wilson, Jackson, Hunt, and Clum, and the Oneonta defendants' motion to dismiss the Fourth Amendment claim of Vincent Quinones, such motion is denied.

Finally, Laurence Plaskett alleges that while attempting

to board a bus at the Oneonta bus station, a uniformed State Police Trooper stopped him and said that Mr. Laurence could not get on the bus until he showed the officer his hands. Mr. Laurence alleges that he refused and tried to pass, but that the officer blocked the doorway with his arm until Mr. Laurence complied. These circumstances clearly raise a material factual issue as to whether a reasonable person would have believed that he was not free to leave. Certainly, after having refused to comply with an officer's request, having tried to pass, and having been prevented by the person of the officer, it cannot be said as a matter of law that no reasonable person would have felt detained. Thus, the Court denies the motion to dismiss the Fourth Amendment claim of Mr. Laurence pursuant to either Rule 12(b)(6) or 56 as to the State Police defendants Wilson, Jackson, Hunt, and Clum.

The allegations in the second amended complaint set forth incidents involving alleged wrongful conduct by certain law enforcement officials against 27 separate individual plaintiffs. Although most of these encounters with law enforcement officials appear to have been unpleasant, and the individuals subjectively did not feel free to leave, they do not meet the legal standard for seizure under the Mendenhall test. Thus, summary judgment in favor of the individual SUCO Public Safety Officers, Oneonta Police Officers, and State Police Officers should be granted on the Fourth Amendment claims under § 1983 as to each plaintiff, with the exception of plaintiffs Ronald Jennings, Vincent Quinones, and Laurence Plaskett, to the extent set forth herein.

D. Equal Protection Claims

All of the defendants argue that plaintiffs have failed, despite repleading, to state a viable claim for violations of the equal protection clause, as applied to the states through the fourteenth amendment. The crux of the defendants' arguments is that the plaintiffs have failed to allege any facts tending to show that similarly situated non-minority individuals were treated in a different manner than the plaintiffs in this case. Plaintiffs claim that the investigatory stops made by law enforcement officers were made solely on the basis of race and thus violated the fourteenth amendment.

Although race can be considered as a relevant factor in making an investigatory stop, law enforcement officials may not use race alone as a basis for such a stop. United States v. Brignoni- Ponce, 422 U.S. 873, 886-87, 95 S.Ct. 2574, 2582-83, 45 L.Ed.2d 607 (1975); United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir.1982), *cert. denied*, 459 U.S. 1211, 103 S.Ct. 1206, 75 L.Ed.2d 447 (1983). However, alleging that a stop was race-based is not enough to make out an equal protection claim, since "[t]o establish an equal protection claim, it is not enough to show 'bad motive' on the part of the [defendant]." Sector Enterprises, Inc. v. DiPalermo, 779 F.Supp. 236, 247 (N.D.N.Y.1991). In order to assert a valid claim of equal protection rights, the plaintiffs must show the existence of a similarly situated non-minority group who has been treated differently. Samaad v. City of Dallas, 940 F.2d 925, 941 (5th Cir.1991); Sector Enterprises at 247. Moreover, the plaintiffs must show that *these* defendants have treated them differently than other similarly situated non- minority people. Sector Enterprises at 247. The equal protection clause

"is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985) (citing, Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)).

In this case, the Court must determine whether the plaintiffs have made allegations in the second amended complaint that, when viewed in the light most favorable to the plaintiffs, and drawing all inferences in favor of the plaintiffs, sets forth a claim sufficient to withstand a dismissal motion under Rule 12(b)(6). See, LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir.1991). The plaintiffs make the broad allegation that "all persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures under the Fourth Amendment," and that "[o]n information and belief, defendants ... have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out ... every white male in and around Oneonta, New York." (Second Amended Complaint pars. 235-236). This does not meet the standard required for showing that the plaintiffs were impermissibly treated differently than other similarly situated persons. See Samaad at 941 (stating that the claim that grand prix races would not have been allowed adjacent to predominantly white neighborhoods was not a sufficient showing of disparate treatment of similarly situated persons); see also Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 61 (2d Cir.1985) (noting that in order to present a valid equal protection claim for discriminatory treatment by officials in handling an application to the zoning board, the plaintiffs must allege that the defendants actually treated their application differently than other similar applications).

Plaintiffs have made no showing that similarly situated non-minorities, in fact, were treated differently than plaintiffs by these defendants. In this case, a valid equal protection claim would have to allege more than that all persons have the right to be treated equally under the Fourth Amendment, that all New York residents, regardless of race are similarly situated, or that any white male suspected of a crime is similarly situated. Plaintiffs would have to allege that a similarly situated group of non-minority individuals was treated differently by law enforcement officers in some other respect. Thus, the issue turns on what it means to be "similarly situated."

The delineation between similar and dissimilar must not be made so broad so as to enable a plaintiff to plead an equal protection claim in any situation in which police treat people suspected of different crimes differently. See, U.S. v. Brignoni-Ponce, 422 U.S. at 886-87, 95 S.Ct. at 2582-83 (1975) (noting that multiple factors may be considered by law enforcement officers when deciding whether to stop and search, such that not all stops violate the Fourth Amendment); see generally, Albert v. Carovano, 851 F.2d 561, 572 (2d Cir.1988) (42 U.S.C. § 1981 case). It is safe to say that some crimes, such as violent or unusual crimes, prompt a more vigorous response from law enforcement personnel.[2]

In this case, an elderly woman was violently assaulted

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[2] One need only turn on the national television news to hear an account of the latest extraordinary efforts of law enforcement agencies attempting to apprehend or convict a person(s) suspected of violent crimes.

while sleeping at a friend's home. The alleged perpetrator of the crime was reported to be a young black male who had sustained a cut on his hand or arm. To defeat a motion to dismiss under 12(b)(6), the plaintiffs need not allege that a young white male suspected of the same sort of crime, and under the exact facts, was treated differently by law enforcement officials. See generally, City of Cleburne, 473 U.S. at 442, 105 S.Ct. at 3255. However, plaintiffs must allege more than that a white male suspected of *any* crime was not sought in the same manner as in the instant case. The crime committed in this case was violent. Plaintiffs have made no allegation and presented no evidence that a white male suspected of a *violent* crime was treated differently from plaintiffs. Thus, plaintiffs have not shown that a similarly situated class of non-minority individuals exists, much less that they were treated more favorably than plaintiffs.

Even assuming that plaintiffs had properly pleaded a claim under the equal protection clause, the Court would have dismissed the claim as against the Oneonta police defendants. The Oneonta police defendants cooperated with plaintiffs' discovery requests. In discovery plaintiffs sought records of all crimes in which a "white male" or "young white male" was described by the Oneonta police as the suspect. A list of 875 crimes fitting that description was generated by the Oneonta police defendants, yet none involved a violent crime.[3] Thus, the plaintiffs have failed to show that they were treated differently than similarly situated non-minorities, and failed to

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[3] The overwhelming majority of the crimes were drug offenses and petit larceny.

show that a group of similarly situated non-minorities even exist--at least with respect to the Oneonta law enforcement defendants. See, Gehl Group v. Koby, 63 F.3d 1528 (10th Cir. Colo.) (alleging that no other solicitation group had been prosecuted failed to show different treatment of similarly situated group, and equal protection claim failed); see also, Klinger v. Dept. of Corrections, 31 F.3d 727, 731-32 (8th Cir.1994) (granting defendants' motion for summary judgment where size, length of stay, and level of security demonstrated that inmates in two prison facilities were not similarly situated). The Court finds that there is no evidence that raises a material factual issue as to whether the Oneonta police defendants had in fact treated whites differently from the plaintiffs. Thus, even if properly pleaded, plaintiffs would not have survived summary judgment as against the Oneonta police defendants.

As to the State Police defendants, the Court can point to no facts in the record to show that they did or did not treat non-minority individuals more favorably than the plaintiffs. Since the State Police defendants did not provide plaintiffs with any discovery, the Court cannot say that no material factual issue could be raised should plaintiffs replead a claim alleging an equal protection violation that could withstand a 12(b)(6) motion. Therefore, the Court dismisses plaintiffs second amended complaint as to the equal protection claim, without prejudice, and with leave to replead, only as against the State Police defendants.

E. 42 U.S.C. § 1981 Claim

Under 42 U.S.C. § 1981, an individual is provided with substantive rights and remedies rather than just a vehicle to

assert violations of other statutory or constitutional rights. Napoleon v. Xerox Corp., 656 F.Supp. 1120, 1123 (D.Conn.1987) (42 U.S.C. § 1981 provides substantive rights unlike 42 U.S.C. §§ 1983, 1985). Thus, the requirements for stating a valid cause of action under 42 U.S.C. § 1981 are different from those of other laws.

To properly plead a claim under 42 U.S.C. § 1981, the plaintiffs must allege facts which establish that defendants' actions were racially motivated and purposefully discriminatory. General Building Contractors Asso. v. Pennsylvania, 458 U.S. 375, 386, 102 S.Ct. 3141, 3148, 73 L.Ed.2d 835 (1982). "Under § 1981, the events of the intentional and purposeful discrimination, as well as the racial animus constituting the motivating factor for the defendant's actions must be specifically pleaded in the complaint to withstand dismissal under Rule 12(b)(6)." Yusuf v. Vassar College, 827 F.Supp. 952, 955 (S.D.N.Y.1993), *aff'd in part and rev'd in part,* 35 F.3d 709 (2d Cir.N.Y.1994). If plaintiffs claim selective enforcement under 42 U.S.C. § 1981, then the complaint must contain specific instances where plaintiffs "were 'singled ... out for unlawful oppression' in contrast to others *similarly situated.*" Albert v. Carovano, 851 F.2d 561, 573 (2d Cir.1988) (citing, Birnbaum v. Trussell, 347 F.2d 86, 90 (2d Cir.1965) (citations omitted) (emphasis added in original)). Thus, as has been previously stated herein, since plaintiffs have not alleged a similarly situated non-minority group in the second amended complaint, and since there may conceivably be a material question of fact as to the State Police defendants, assuming such evidence is produced in discovery, the Court dismisses plaintiffs' claims brought under 42 U.S.C. § 1981, with leave to replead as against the State Police

defendants only.

Notwithstanding the foregoing analysis, and since the Court is now considering these claims for the third time, the Court will address the issue of whether plaintiffs have pleaded sufficient facts to withstand a motion to dismiss, and if so, raised a material factual issue as to the second required element of a 42 U.S.C. § 1981 claim, racial animus.

Defendants correctly point out that race is a factor that police may consider when pursuing criminal investigations. See, Buffkins v. Omaha, 922 F.2d 465, 468 (8th Cir.1990). Defendants then argue that there was no purposeful discrimination on the part of any law enforcement defendants because race was only one factor, along with age and gender,[4] on which such defendants relied when determining whom to question. Plaintiffs counter by arguing that they have sufficiently alleged purposeful discrimination. The Court notes, at this juncture, that plaintiffs must allege more than mere conclusory allegations and naked assertions to withstand a motion under Rule 12(b)(6). See, e.g., Brown v. Oneonta (Brown II), 858 F.Supp. 340, 344 (N.D.N.Y.1994) (citations omitted). Plaintiffs point to the number of individuals questioned who allege that such questioning was motivated solely by race, to the fact that a black female was questioned by

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[4] Defendants seem to argue that the existence of a cut on the arm or hand was another factor, but it is undisputed that the law enforcement defendants did not stop and/or question only young black males with cuts on their arms or hands.

the police, and that there were no factors other than race to justify the stops. Plaintiffs claims that such a showing raises a material factual issue.

The Court finds that there are material questions of fact as to the alleged racial animus of the defendants in this case. The law enforcement defendants claim that age and gender were additional factors that motivated the police to stop plaintiffs, yet there are no facts presented by either side to show the age of each plaintiff.[5] In addition, it is clear that at least one female was stopped in relation to the search for a "young black male," identified herself as a female to the officer, yet was asked to show identification to the officer before being allowed to get on a bus. It is reasonable to conclude that, at least as to that stop, gender was not an additional factor to consider when deciding whether to question an individual. The aforementioned incident, the fact that there is no evidence that non-blacks were questioned, the fact that blacks were questioned both on and off the SUCO campus,[6] and the fact that the stops and questioning is alleged to have continued for a period of days after the incident, raise a material question of fact as to whether the defendants acted with discriminatory intent.

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[5] Not all plaintiffs were college students, and not all college students are young.

[6] The suspect was traced by a canine unit to the property line of the SUNY Oneonta (SUCO) campus.

G. City Of Oneonta Liability Under 42 U.S.C. § 1983

A municipality may not be held liable solely on the basis of a constitutional violation committed by an individual whom it employs. See, Monell v. Dept. of Social Servs., 436 U.S. 658, 695, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Rather, "it is when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts and acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell, 436 U.S. at 695, 98 S.Ct. at 2037-38. Such discriminatory policies and customs may be established if they are "so permanent and well-settled as to constitute a 'custom or usage' with the force of law." Id., 436 U.S. at 692, 98 S.Ct. at 2036. Municipal liability may also be established by a single discriminatory act, particularly "where action is directed by those who establish governmental policy." Pembaur v. Cincinnati, 475 U.S. 469, 482, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). However, the Supreme Court explained that municipal liability under 42 U.S.C. § 1983 "attaches where-- and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur, 475 U.S. at 484-85, 106 S.Ct. at 1300.

The plaintiffs argue that they have established municipal liability pursuant to the dictates of Monell. First, the plaintiffs argue that the multiple investigatory stops or questionings constitute evidence of an unwritten policy of conduct that violated the plaintiffs' constitutional rights. See Pembaur v. Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89

L.Ed.2d 452 (1986). Second, the plaintiffs argue that the aforementioned incidents raise a question of fact as to an alleged "failure to train" theory of municipal liability. See Kibbe v. Springfield, 777 F.2d 801 (1st Cir.1986).

The defendants argue that there is no formal policy sanctioning improper searches. In addition, the defendants argue that Chief Donadio of the Oneonta Police department was not involved with the execution or supervision of the investigatory stops, and thus, cannot be said to be a "policymaker" for the purposes of Monell liability. Finally, the defendants argue that the failure to train argument is without merit, because there is no history of equal protection or Fourth Amendment violations of which the city was aware and deliberately ignored. See Walker v. New York, 974 F.2d 293 (2d Cir.1992), *cert. denied,* 507 U.S. 961, 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993).

Under Pembaur, a municipality may be held liable if a "decision to adopt [a] particular course of action is properly made by that government's *authorized decisionmakers* ..." 475 U.S. at 481, 106 S.Ct. at 1299. In this case, Chief Donadio was not an authorized decisionmaker. Moreover, he had no involvement with the conduct complained of herein. The court does not mean to say that he could not have been the decisionmaker, but that given the record before the court there is no evidence to raise a question of fact as to whether he was a policymaker such that the city of Oneonta could be held liable on that basis.

Under Walker, a municipality may be held liable under 42 U.S.C. § 1983 for a failure to train officers. 974 F.2d at

297. Such failure to train amounts to an act of "deliberate indifference" to the rights of those who will be affected by the officers' conduct. Id. However, as Walker instructs, there are three requirements that the plaintiffs must show to establish deliberate indifference. First, the policymaker must know "'to a moral certainty' that her employees will confront a given situation." Id., (*citing*, City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)). "Second, the plaintiff must show that the situation *either* presents the employee with a difficult choice of the sort that training or supervision will make less difficult *or* that there is a history of employees mishandling the situation." Id., (emphasis added). Third, "the plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights." Id. at 298.

As to the first element, it cannot seriously be contended, and has not, that a policymaker for the city of Oneonta did not know with a high degree of certainty that police officers would conduct investigatory stops.

As to the second element, the defendant Oneonta submits to the court that there is no showing of a history of equal protection or Fourth Amendment violations that the city was aware of yet failed to address. However, the defendant Oneonta does not address the alternative prong of the second requirement: whether the situation presents the employee with a difficult choice of the sort that training or supervision will make less difficult. As to this prong, the court finds that a material question of fact is raised.

The court cannot say as a matter of law that training or

supervision as to the difficult Fourth Amendment situations raised by the investigation following this odious crime would not have prevented the conduct complained of herein. The defendant Oneonta has not shown that the officers were trained or supervised in this area of constitutional protection, nor has it argued, much less made a showing, that training would not have made any difference. Accordingly, the court must deny the city of Oneonta's motion for summary judgment as to municipal liability under 42 U.S.C. § 1983. The court need not address the third requirement set forth in Walker.

I. Conspiracy to Violate FERPA in Violation of § 1983

The plaintiffs' ninth cause of action charges that defendants Hartmark, Wilson, Hunt, Chandler and Shedlock, who are all state defendants conspired to violate FERPA through their alleged participation in requesting, approving, compiling, releasing, and using the list of black male SUCO students. Defendants claim that the allegations of conspiracy are too vague and conclusory to create a valid cause of action.

A complaint comprised only of conclusory and vague conspiracy allegations to deprive a person of rights may be dismissed under Fed.R.Civ.P. 12(b)(6). Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.1983), *cert. denied,* 464 U.S. 857, 104 S.Ct. 177, 78 L.Ed.2d 158. To support a conspiracy charge, the plaintiffs must show that the defendants "acted in a willful manner, culminating in an agreement, understanding, or 'meeting of the minds,' which violated the plaintiffs' rights." Katz v. Morgenthau, 709 F.Supp. 1219, 1231 (S.D.N.Y.1989), *aff'd in part and rev'd in part,* 892 F.2d 20 (2d Cir.1989). On

the other hand, it is recognized that conspiracies are rarely proven by direct evidence, and so "factual allegations of overt acts which give rise to a *reasonable* inference of the formation and furtherance of a conspiracy will suffice." Long Island Lighting Co. v. Cuomo, 666 F.Supp. 370, 425-26 (N.D.N.Y.1987). Nonetheless, the plaintiffs must still show through the supporting facts that there was a meeting of the minds, not just that the defendants "acted in concert with a common goal." Cuomo at 426.

In this case, the plaintiffs have adequately presented facts to support their conspiracy allegations. The plaintiffs detail the overt acts of communication among the defendants which could reasonably lead to an inference of the formation or furtherance of a conspiracy. The defendants seek dismissal based on the fact that the plaintiffs have put forth no evidence of a specific agreement. However, under the standard elaborated in Cuomo that is not necessary for a valid conspiracy pleading. Thus, the defendants motion for dismissal of the claims of conspiracy to violate FERPA under § 1983 is denied.

J. Plaintiffs' Claim Under 42 U.S.C. § 1985(3)

"To prevail on a § 1985(3) claim, a plaintiff must prove that defendants (1) engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or the equal privileges and immunities under the laws; (3) acted in furtherance of the conspiracy; and (4) deprived such person or class of persons the exercise of any right or privilege of a citizen of the United States." New York State NOW v. Terry, 886 F.2d 1339, 1358 (2d Cir.1989). It is clear from the plaintiffs' second amended

complaint that these four elements have been pleaded in paragraphs 317 to 324 in the fourteenth cause of action. Defendants allege that this 42 U.S.C. § 1985(3) claim has not been properly pleaded because the plaintiffs have not sufficiently alleged that a conspiracy occurred. However, as stated previously, "conspiracies are seldom proven with direct evidence, and thus factual allegations of overt acts which give rise to a *reasonable* inference of the formation and furtherance of a conspiracy will suffice." Long Island Lighting Co. v. Cuomo, 666 F.Supp. 370, 426 (N.D.N.Y.1987). Thus, as previously decided the defendant Hartmark's motion to dismiss this cause of action for failure to state a claim must be denied because the plaintiffs sufficiently elaborate the factual grounds on which they base their conspiracy claims in regard to the creation, approval, and release of the list.

However, the 42 U.S.C. § 1985(3) claim must be denied insofar as it relies on violations of the 4th and 14th Amendments. It is clear that 42 U.S.C. § 1985(3) does not provide substantive rights and remedies, but rather is simply a vehicle by which to bring causes of action for violations of other federal statutes and the constitution. Napoleon v. Xerox Corp., 656 F.Supp. 1120, 1123 (D.Conn.1987). Thus, if the underlying violations of federal law are found to be invalid, the 42 U.S.C. § 1985(3) claim must fail as well. In this case the 4th and 14th Amendment claims are dismissed for failure to state a valid cause of action, and thus no 42 U.S.C. § 1985(3) claim for conspiracy to violate these provisions of the Constitution may be upheld. Thus, the 42 U.S.C. § 1985(3) claim is dismissed insofar as it pertains to violations of the Fourth and Fourteenth amendments, with prejudice as to the Oneonta defendants and without prejudice as to the state defendants.

J. 42 U.S.C. § 1986 Claim

The sole reason for the existence of 42 U.S.C. § 1986 is to provide a remedy for the violation of 42 U.S.C. § 1985. Levy v. New York, 726 F.Supp. 1446, 1455 (S.D.N.Y.1989). Thus, stating a valid cause of action under § 1985 creates a valid cause of action under § 1986. Levy at 1455. Therefore, to the extent that the court has granted and denied the defendants motions to dismiss the 42 U.S.C. § 1985 claims, it so rules as to the 42 U.S.C. § 1986 claims.

K. Pendent State Claims

This court may exercise jurisdiction over state law claims if, in its discretion, it decides to exercise supplemental jurisdiction. Pursuant to 28 U.S.C. § 1367(a), the exercise of supplemental jurisdiction is appropriate "in any civil action of which the district courts have original jurisdiction," and wherein the state claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a) (1990 & Supp.). The same facts and circumstances giving rise to the claims on which the jurisdiction of this court is based, also form the basis for the state claims. Accordingly, in the interest of judicial economy and pursuant to 28 U.S.C. § 1367, the court will exercise supplemental jurisdiction over the state law claims.

L. Discovery Issues

The discovery issues raised in these motions are referred to the magistrate judge for a determination not inconsistent with this decision.

II CONCLUSION

For the foregoing reasons, the court (1) GRANTS defendants Chandler, Ferrand, Way, Ferago, More, Kimball, Grant, Redman, and Olsen's motions to dismiss the 27 additional plaintiffs' Fourth Amendment claims, and GRANTS all the remaining defendants' motions for summary judgment as to the Fourth Amendment claims against all the plaintiffs' except, plaintiffs Ronald Jennings, Vincent Quinones, and Laurence Plaskett; (2) GRANTS the Oneonta defendants' motion to dismiss the plaintiffs' equal protection, 42 U.S.C. § 1981, 42 U.S.C. § 1985, and 42 U.S.C. § 1986 claims with prejudice, and GRANTS the State Police defendants' motion to dismiss the plaintiffs' equal protection, 42 U.S.C. § 1981, 42 U.S.C. § 1985, and 42 U.S.C. § 1986 claims without prejudice; (3) DENIES the city of Oneonta's motion for summary judgment as to municipal liability pursuant to Monell; (4) DENIES the defendants' motion to dismiss the plaintiffs' claim of a conspiracy to violate FERPA under 42 U.S.C. § 1983, and (5) GRANTS the defendants' motion for the court to exercise supplemental jurisdiction over any remaining state law based claims.

IT IS SO ORDERED.

Dated December , 1995 (filed Jan. 3, 1996)
at Binghamton, New York

Thomas J. McAvoy
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICKY BROWN, JAMEL CHAMPEN, SHERYL CHAMPEN, HOPETON GORDON, HEAN CANTAVE, RAISHAWN MORRIS, TIM RICHARDSON, DARRYL TAYLOR, ROBERT WALKER, CLEMENT MALLORY, RONALD SANCHEZ, DARNELL LEMONS, JOHN BUTLER, MICHAEL CHRISTIAN, KING GONZALES, JASON CHILDS, PAUL HEYWARD, JR., RONALD JENNINGS, PAUL HOWE, BUBU DEMASIO, WILSON ACOSTA, CHRIS HOLLAND, JERMAINE ADAMS, FELIX FRANCIS, DANIEL SONTAG, RONALD LYNCH, KENNETH MCCLAIN, HERVEY PIERRE, VINCENT QUINONES, LAURENCE PLASKETT, LAMONT WYCHE, STEVEN YORK, TYRONE LOHR, on behalf of themselves and all other persons similarly situated; and MAJOR BARNETT, CHARLES BATTISTE, KEVIN ALLEN and WAYNE LEWIS, on Behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

CITY OF ONEONTA, NEW YORK; POLICE DEPARTMENT OF THE CITY OF ONEONTA, NEW YORK; CHIEF OF POLICE OF THE CITY OF ONEONTA JOHN J. DONADIO, in his individual and official capacities; ONEONTA POLICE OFFICER CARL SHEDLOCK, in his individual and official capacities; ONEONTA POLICE OFFICER JOSEPH REDMOND, in his individual and official capacities; ONEONTA POLICE OFFICER WILLIAM DAVIS,

in his individual and official capacities ONEONTA POLICE OFFICER OLSEN, in his individual and official capacities;ANONYMOUS OFFICERS AND INVESTIGATORS OF THE POLICE DEPARTMENT OF THE CITY OF ONEONTA, in their individual and official capacities; STATE OF NEW YORK; STATE UNIVERSITY OF NEW YORK; STATE UNIVERSITY OF NEW YORK, COLLEGE AT ONEONTA ("SUCO"); NEW YORK STATE POLICE; NEW YORK STATE POLICE INVESTIGATOR H. KARL CHANDLER in his individual and official capacities; NEW YORK STATE POLICE TROOP C COMMANDER ROBERT FARRAND in his individual and official capacities; NEW YORK STATE POLICE INVESTIGATORS GEORGE CLUM, KEVIN MORE, JOHN WAY in their individual and official capacities; NEW YORK STATE TROOPER MARK KIMBALL in; his individual and official capacities; NEW YORK STATE TROOPER KENNETH GRANT in his individual and official capacities; NEW YORK STATE TROOPER FARRAGO in his individual and official capacities; ANONYMOUS STATE POLICE OFFICERS AND INVESTIGATORS in their individual and official capacities; SUCO DEPARTMENT OF PUBLIC SAFETY; SUCO DEPARTMENT OF PUBLIC SAFETY OFFICERS MERRITT HUNT, TIM JACKSON, JOHN EDMONDSON AND ANONYMOUS PUBLIC SAFETY OFFICERS in their individual and official capacities; LEIF HARTMARK, in his individual and official capacities; BRIAN WILSON AND ANONYMOUS SUCO COMPUTER EMPLOYEES in their individual and official capacities,

Defendants.

SECOND AMENDED COMPLAINT
JURY TRIAL DEMANDED

Civil Action No. 93-CV-0349
(TJM/DNH)

Plaintiffs, by their attorneys, Whiteman Osterman & Hanna, for their complaint, allege as follows:

PRELIMINARY STATEMENT

1. This is an action for damages suffered by certain non-white members of the communities of the City of Oneonta and the State University of New York, College at Oneonta ("SUCO") during the course of a racially-motivated investigation conducted by SUCO employees, the City of Oneonta, and law enforcement officials and officers in the New York State Police, the Police Department of the City of Oneonta, the Otsego County Sheriff's Department and the SUCO Office of Public Safety ("law enforcement officials").

2. On September 4, 1992, between approximately 12:00 a.m. and 2:00 a.m., a 77-year-old woman was allegedly attacked in the course of what was reported as an attempted burglary in the house of a friend with whom she was staying. Although the room in which she was attacked was dark, the woman told police that she saw the assailant's hand or lower forearm and, based upon that observation, concluded that the assailant was black. She further stated that the assailant was young because she heard him run quickly across the room.

3. Based upon this limited information, defendants

law enforcement officials first wrongfully sought and obtained from SUCO defendants a list containing the names and addresses of all the male African-American students at SUCO. The law enforcement officials then sought out, approached, questioned, seized and/or searched every person on that list.

4. When these efforts failed to result in the apprehension of a suspect, the law enforcement officials turned their focus on every non-white person in the City of Oneonta, and conducted a "sweep" of the entire City of Oneonta. During the "sweep," which occurred over a five-day period, the officials, without any basis for suspecting any individual approached except for his or her race, attempted to stop, question and physically inspect the hands of any and every non-white person in and around the City of Oneonta.

5. The defendants' violations of the civil rights secured to the plaintiffs by federal and state constitutional, statutory and common law have caused each and every plaintiff to suffer anguish, embarrassment, humiliation, and a profound loss of dignity.

6. Plaintiffs bring this action pursuant to 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, 2000d and 2000d-7, the Fourth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, Article 1, § 11 of the New York State Constitution, Article 1, § 12 of the New York State Constitution, New York Civil Rights Law §§ 8 and 40-c, New York Public Officers Law Art. 6-A, §§ 91-99, and principles of federal and New York State common law. A jury trial is requested.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343 and 1367.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) and/or (b)(2), in that (1) one or more defendant resides in this district and all defendants reside in the State of New York, and/or (2) a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of New York.

THE PARTIES

Plaintiffs

9. At all times relevant to this action, plaintiff Major Barnett was a resident of the City of Oneonta and a student at SUCO. Mr. Barnett's name was on the list wrongfully generated by SUCO and wrongfully used by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

10. At all times relevant to this action, plaintiff Charles Battiste was a resident of the City of Oneonta and a student at SUCO. Mr. Battiste's name was on the list wrongfully generated by SUCO and wrongfully used by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

11. At all times relevant to this action, plaintiff Kevin Allen was a resident of the City of Oneonta and a student

at SUCO. Mr. Allen's name was on the list wrongfully generated by SUCO and wrongfully used by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

12. At all times relevant to this action, plaintiff Wayne Lewis was a resident of the City of Oneonta and a student at SUCO. Mr. Lewis's name was on the list wrongfully generated by SUCO and wrongfully used by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

13. At all times relevant to this action, plaintiff Ricky Brown was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Brown was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

14. At all times relevant to this action, plaintiff Jamel Champen was a resident of the City of Oneonta. As more fully set forth below, Mr. Champen was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

15. At all times relevant to this action, plaintiff Sheryl Champen was a resident of the City of Oneonta. As more fully set forth below, Ms. Champen was approached, questioned, seized and/or searched during the unlawful

"sweep" conducted by defendants law enforcement officials. She sues on her own behalf and on behalf of all persons similarly situated.

16. At all times relevant to this action, plaintiff Hopeton Gordon was a resident of the City of Oneonta. As more fully set forth below, Mr. Gordon was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

17. At all times relevant to this action, plaintiff Jean Cantave was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Cantave was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

18. At all times relevant to this action, plaintiff Raishawn Morris was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Morris was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

19. At all times relevant to this action, plaintiff Tim Richardson was a resident of the City of Oneonta and a Resident Director of a dormitory at SUCO. As more fully set forth below, Mr. Richardson was approached, questioned,

seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

20. At all times relevant to this action, plaintiff Darryl Taylor was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Taylor was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

21. At all times relevant to this action, plaintiff Robert Walker was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Walker was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

22. At all times relevant to this action, plaintiff Clement Mallory was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Mallory was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

23. At all times relevant to this action, plaintiff Ronald Sanchez was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Sanchez was approached, questioned, seized and/or searched during the

unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

24. At all times relevant to this action, plaintiff Darnell Lemons was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Lemons was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

25. At all times relevant to this action, plaintiff John Butler was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Butler was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

26. At all times relevant to this action, plaintiff Michael Christian was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Christian was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

27. At all times relevant to this action, plaintiff King Gonzalez was a student at SUCO. As more fully set forth below, Mr. Gonzalez was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by

defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

28. At all times relevant to this action, plaintiff Jason Childs was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Walker was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

29. At all times relevant to this action, plaintiff Paul Heyward, Jr. was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Heyward was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

30. At all times relevant to this action, plaintiff Ronald Jennings was a student at SUCO. As more fully set forth below, Mr. Walker was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

31. At all times relevant to this action, plaintiff Paul Howe was a student at SUCO. As more fully set forth below, Mr. Howe was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

32. At all times relevant to this action, plaintiff Bubu Demasio was a student at SUCO. As more fully set forth below, Mr. Demasio was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

33. At all times relevant to this action, plaintiff Wilson Acosta was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Acosta was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

34. At all times relevant to this action, plaintiff Chris Holland was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Holland was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

35. At all times relevant to this action, plaintiff Jermaine Adams was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Adams was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

36. At all times relevant to this action, plaintiff Felix Francis was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Francis was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

37. At all times relevant to this action, plaintiff Daniel Sontag was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Sontag was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

38. At all times relevant to this action, plaintiff Ronald Lynch was a student at SUCO. As more fully set forth below, Mr. Lynch was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

39. At all times relevant to this action, plaintiff Kenneth McClain was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. McClain was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

40. At all times relevant to this action, plaintiff

Hervey Pierre was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Pierre was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

41. At all times relevant to this action, plaintiff Vincent Quinones was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Quinones was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

42. At all times relevant to this action, plaintiff Laurence Plaskett was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Plaskett was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

43. At all times relevant to this action, plaintiff Lamont Wyche was a student at SUCO. As more fully set forth below, Mr. Lamont was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

44. At all times relevant to this action, plaintiff Steven York was a resident of the City of Oneonta and a

student at SUCO. As more fully set forth below, Mr. York was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

45. At all times relevant to this action, plaintiff Tyrone Lohr was a resident of the City of Oneonta and a student at SUCO. As more fully set forth below, Mr. Lohr was approached, questioned, seized and/or searched during the unlawful "sweep" conducted by defendants law enforcement officials. He sues on his own behalf and on behalf of all persons similarly situated.

Class Allegations

46. Plaintiffs bring this action as a class action on behalf of all non-white members of the communities of SUCO and the City of Oneonta injured by the actions of the defendants.

47. The classes can be defined as (1) those persons whose names were on the list wrongfully generated by SUCO at the request of law enforcement officials ("Class I"), and (2) the class of non-white persons sought out, approached, questioned, seized and/or searched by law enforcement officials, during the period of September 4 through September 9, 1992 ("Class II").

48. Plaintiffs meet the requirements for certification of this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

49. Each class consists of over 70 members and may consist of as many as 300 members. Accordingly, each class is so numerous that joinder of all members is impracticable.

50. Questions of law and fact common to each class predominate over any questions affecting only individual class members. These common questions include whether the defendants engaged in a conspiracy to violate, and did in fact violate, the federal and state constitutional, statutory and common law rights of the plaintiffs.

51. The claims of the named plaintiffs representing Class I are typical of claims of Class I in that each representative plaintiff, like the members of the class, was injured by the defendants' generation and release of the list of African-American students at SUCO.

52. The claims of the named plaintiffs representing Class II are typical of the claims of Class II in that each representative plaintiff, like the members of the class, was targeted and treated as a criminal suspect by defendants law enforcement officials, based solely on plaintiffs' race, during the "sweep" in and around the City of Oneonta, which "sweep" included the seeking out, approaching, questioning, seizing and/or searching of plaintiffs by defendants law enforcement officials who at that time lacked articulable suspicion, reasonable suspicion or probable cause with respect to each and every individual approached.

53. The named class representatives of each class will fairly and adequately protect the interests of the class.

They are represented by counsel who are experienced in complex litigation and civil rights cases.

Defendants

54. As stated in paragraph 1 of this complaint, defendants "law enforcement officials" include the New York State Police, the Police Department of the City of Oneonta, the Otsego County Sheriff's Department and the SUCO Department of Public Safety and certain individual members thereof. Those individual defendant law enforcement officials are hereafter listed in paragraphs 55-76.

55. Defendant H. Karl Chandler is and was at all times relevant to this action employed as an Investigator for the New York State Police. Defendant Chandler is sued in his individual capacity, as an employee of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

56. Defendant Robert Farrand was at all times relevant to this action an employee of the New York State Police. Upon information and belief, defendant Farrand held the rank of Major and was Troop Commander of New York State Police Troop C, which Troop is headquartered in Sidney, New York and has jurisdiction over and responsibility for State Police activities in the geographic region in which the events relevant to this action occurred. Defendant Farrand is sued in his individual capacity, as an employee of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

57. Defendant George Clum is and was at all times relevant to this action an employee of the New York State Police. Defendant Clum is sued in his individual capacity, as an employee of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

58. Defendant Kevin More is and was at all times relevant to this action an employee of the New York State Police. Defendant More is sued in his individual capacity, as an employee of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

59. Defendant John Way is and was at all times relevant to this action an employee of the New York State Police. Mr. Way is sued in his individual capacity, as an employee of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

60. Defendant Mark Kimball is and was at all times relevant to this action an employee of the New York State Police. Mr. Kimball is sued in his individual capacity, as an employee of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

61. Defendant Kenneth Grant is and was at all times relevant to this action an employee of the New York State Police. Mr. Grant is sued in his individual capacity, as an employee of the New York State Police and, solely for

purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

62. Defendant Farrago is and was at all times relevant to this action an employee of the New York State Police. Mr. Farrago is sued in his individual capacity, as an employee of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

63. Defendants "Anonymous State Police Officers and Investigators" are those employees of the New York State Police and the New York State Bureau of Criminal Investigation who participated in the acts resulting in the violations of which plaintiffs complain herein, whose names are not yet known by plaintiffs but whose names should become known during the course of discovery in this action. These individuals are sued in their individual capacities, as employees of the New York State Police and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in their official capacities.

64. Defendant Merritt Hunt is, upon information and belief, an employee of the SUCO Department of Public Safety holding the rank of Lieutenant. Mr. Hunt is sued in his individual capacity, as an employee of the SUCO Department of Public Safety and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

65. Defendant Tim Jackson is, upon information and belief, an employee of the SUCO Department of Public Safety. Mr. Jackson is sued in his individual capacity, as an

employee of the SUCO Department of Public Safety and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

66. Defendant John Edmondson was, upon information and belief, the Director of head of the SUCO Department of Public Safety at all times relevant to this action. Mr. Edmondson is sued in his individual capacity, as an employee of the SUCO Department of Public Safety and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

67. Defendants "Anonymous Public Safety Officers" are those employees of the SUCO Department of Public Safety who participated in the acts resulting in the violations of which plaintiffs complain herein, whose names are not yet known by plaintiffs but whose names should become known during the course of discovery in this action. These individuals are sued in their individual capacity, as employees of the SUCO Office of Public Safety and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in their official capacity.

68. Defendant John J. Donadio is, and was at all times relevant to this action, Chief of Police of the City of Oneonta. He is sued in his individual and official capacities, and as an employee of the City of Oneonta.

69. Defendant Carl Shedlock is, and was at all times relevant to this action, a police officer and/or investigator employed by the Police Department of the City of Oneonta. He is sued in his individual and official capacities, and as an

employee of the City of Oneonta.

70. Defendant Joseph Redmond is, and was at all times relevant to this action, a police officer and/or investigator employed by the Police Department of the City of Oneonta, holding, upon information and belief, the rank of sergeant. He is sued in his individual and official capacities, and as an employee of the City of Oneonta.

71. Defendant William Davis is, and was at all times relevant to this action, a police officer and/or investigator employed by the Police Department of the City of Oneonta. He is sued in his individual and official capacities, and as an employee of the City of Oneonta.

72. Defendant Olsen is, and was at all times relevant to this action, a police officer and/or investigator employed by the Police Department of the City of Oneonta. He is sued in his individual and official capacities, and as an employee of the City of Oneonta.

73. Defendants "Anonymous Officers and Investigators of the Police Department of the City of Oneonta" are those police officers and investigators who participated in the conspiracy to procure and release the computer-generated list of African-American SUCO students, and/or thereafter participated in the "sweep" of the SUCO campus and the City of Oneonta resulting in the violations of which plaintiffs complain herein, whose names are not yet known by plaintiffs but whose names should become known during the course of discovery in this action. These individuals are sued in their individual and official capacities and as employees of the City

of Oneonta.

74. Defendant Sean Ralph, upon information and belief, is and was at all times relevant to this action an employee of the Otsego County Sheriff's Department. Defendant Ralph is sued in his individual capacity.

75. Defendant Chris Lehenbauer, upon information and belief, is and was at all times relevant to this Action an employee of the Otsego County Sheriff's Department. Defendant Lehenbauer is sued in his individual capacity.

76. Defendants "Anonymous Otsego County Sheriff's Deputies, Investigators and/or Officers" are those employees of the Otsego county Sheriff's Department who participated in the acts resulting in the violations of which plaintiffs complain herein, whose names are not yet known by plaintiffs but whose names should become known during the course of discovery in this action. These individuals are sued in their individual capacities.

77. Defendant Leif Hartmark is, and was at all times relevant to this action, an employee of SUCO. Upon information and belief, Mr. Hartmark held the position of Acting President of SUCO at all times relevant to this action. Mr. Hartmark is sued in his individual capacity, as an employee of SUCO and, solely for purposes of plaintiffs' clams under 42. U.S.C. §§ 2000d and 2000d-7, in his official capacity.

78. Defendant Eric Wilson is, and was at all times relevant to this action, an employee of SUCO. Upon information and belief, Mr. Wilson's employment involved

responsibility for storage and retrieval of data and information collected on SUCO computers. Mr. Wilson is sued in his individual capacity, as an employee of SUCO and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in his official capacity.

79. Defendants "Anonymous SUCO Computer Employees" are those employees of SUCO who participated in the creation and release of the computer-generated list of male African-American SUCO students resulting in the violations of which plaintiffs complain herein, whose names are not yet known by plaintiffs but whose names should become known during the course of discovery in this action. These individuals are sued in their individual capacity, as employees of the SUCO Office of Public Safety and, solely for purposes of plaintiffs' claims under 42 U.S.C. §§ 2000d and 2000d-7, in their official capacity.

80. Defendant City of Oneonta is, and was at all times relevant to this action, a municipal corporation organized and existing under the laws of the State of New York, and at all times relevant hereto, employed defendants Donadio, Shedlock, Davis, Redmond, Olsen and other as-yet unnamed defendant Oneonta police officers.

81. Defendant State of New York is, and was at all times relevant to this action, a sovereign State of the United States of America, and at all times relevant hereto, employed, through its agencies and departments defendants State University of New York, SUCO and the New York State Police, defendants Chandler, Farrand, Clum, More, Way, Kimball, Grant, Farrago, Hunt, Jackson, Edmondson,

Hartmark, Wilson, Anonymous State Police Officers and Investigators, Anonymous Public Safety Officers, and Anonymous SUCO Computer Employees.

82. Defendant State University of New York is an agency and/or department of the State of New York.

83. Defendant SUCO is an agency and/or department or other entity of the State University of New York.

84. Defendant New York State Police is an agency and/or department of the State of New York.

85. Defendant Police Department of the City of Oneonta is an agency and/or department of defendant City of Oneonta.

86. Defendant SUCO Department of Public Safety is a department of the State University of New York, College of Oneonta.

FACTUAL ALLEGATIONS

87. On Friday, September 4, 1992, sometime between 12:00 - 2:00 a.m., immediately outside the city limits of Oneonta, a 77-year-old woman from New Jersey, visiting friends in Oneonta, was allegedly assaulted in her bedroom.

88. Upon information and belief, the victim advised police that she did not see her assailant but believed he was black because he had a dark hand or lower forearm. The victim further stated that she believed the assailant was young because

he ran quickly across the room.

89. Upon information and belief, both the assailant and victim were superficially cut with a knife the assailant brandished during the attack.

90. Since the attack occurred outside the city limits of the City of Oneonta, the crime and its investigation were within the jurisdiction of the New York State Police. Under the direction of defendant State Police Investigator H. Karl Chandler, the State Police assumed responsibility for the investigation.

91. Upon information and belief, since no State Police units were then available, a State Police Dispatcher at the Oneonta Barracks contacted the Police Department of the City of Oneonta and requested and received the assistance of the City of Oneonta Police Department.

92. Following initial interviews of the victim by Oneonta Police Officers and defendants Redmond and Olsen, defendants New York State Troopers Kimball, Grant and Farrago arrived at the scene. Upon information and belief, the victim was thereafter interviewed by defendant Chandler.

93. Upon information and belief, defendant Chandler directed the investigating officers to contact hospitals and pharmacies to determine if a non-white male sought treatment for a cut.

94. Upon information and belief, the defendants law enforcement officials thereafter sought from defendants Eric

Wilson and Anonymous SUCO Computer Employees a computer-generated list identifying the names and addresses of all male African-American students at SUCO. Upon information and belief, defendant Eric Wilson was the SUCO employee who generated the list on the SUCO computer system.

95. Defendant Leif Hartmark, at that time acting President of SUCO, authorized the generation of the list and its release to defendants law enforcement officials.

96. Upon information and belief, following the receipt of the computer-generated list, the State Police input the names into State Police computers. "Lead sheets," containing the names, sorted by residence, were then generated by the State Police computers.

97. Using the "lead sheets," the law enforcement officials thereafter sought out. approached, questioned, seized and/or searched the students listed. The law enforcement officials asked each student for an alibi, demanded to inspect and then physically examined the hands and/or forearms of each student for lacerations. African-American faculty members and other SUCO staff were sought out, approached, questioned, seized and/or searched as well.

98. Defendants law enforcement officials also attempted to interview African-American students at Hartwick College and the federal Job Corps Center in the City of Oneonta.

99. The defendants, State Police further attempted

to track down African-American student athletes. In one instance, the State Police contacted the SUCO soccer coach at a tournament in Pennsylvania and directed him to inspect the hands of African-American members of the soccer team.

100. Having failed to apprehend a suspect, defendant Chandler, upon information and belief, directed the law enforcement officials to begin a City-wide "sweep." During the "sweep," which included police in cars stopping non-white persons on Oneonta streets, police made an effort to question and physically examine all non-white males in Oneonta. The objective, as defendant Chandler told the newspapers *Newsday* and the *Oneonta Daily Star*, was to try "to examine the hands of all the black people in the community."

101. During the period of September 4-9, 1992, as more fully set forth below, defendants law enforcement officials sought out, approached, questioned, ~~seized~~ and/or searched any and all non-white members of the SUCO and Oneonta communities. The "sweep" occurred in and around the City of Oneonta, including the bus stations, in or around plaintiffs' apartments, dorm residences, homes, on the SUCO campus, and while plaintiffs merely walked on the public streets.

Ricky Brown

102. Shortly after arriving in Oneonta in September 1992 to begin college, Mr. Brown was walking back to his dormitory from another dormitory on campus at approximately 2:00 a.m. Mr. Brown walked by a police car parked on the side of the road. Once he had walked past the car, he could hear the

car being put into gear.

103. The car drove along side of Mr. Brown for a few minutes, sped up and pulled ahead of him and stopped. When Mr. Brown approached the car, an officer got out and told him to come over to the car and talk to him. As Mr. Brown approached the car, another police car pulled up and two policemen approached him.

104. A policeman asked Mr. Brown where he was coming from. Mr. Brown told him he was coming from a friend's dormitory. The policeman asked Mr. Brown if he was sure. The policeman asked Mr. Brown if he had any i.d.

105. Another policeman asked Mr. Brown where he was coming from. Mr. Brown told him and the officer asked Mr. Brown if he was sure. Mr. Brown gave his i.d. to the first policeman, and it was passed among the policemen who studied it closely.

106. After Mr. Brown's i.d. was returned to him, he asked permission to leave. Although they indicated that Mr. Brown could leave, another policeman then told him to come back.

107. The policeman again asked Mr. Brown where he was coming from, and Mr. Brown told them again. A police officer from the second car told Mr. Brown to show him Mr. Brown's hands.

108. Mr. Brown then showed his hands and a policeman said that the person they were looking for had a cut

on his hands. During this incident, the policemen had formed a circle around Mr. Brown. At least one of the policeman had a hat and a gun.

Jamel Champen

109. Late in the afternoon of September 5, 1992, Mr. Champen was walking home from the Southside Mall when New York State Trooper car pulled next to him. The car's spotlight was pointed in his direction. When Mr. Champen continued walking, a policeman inside the car said, "What, are you stupid? Come here. I want to talk to you."

110. Mr. Champen approached the car and the policeman asked him where he was coming from. Mr. Champen told him the shopping mall. The policeman then told Mr. Champen to show him his hands. Mr. Champen raised his hands in the air and the police pointed the spotlight at them. The policeman then said "O.K." and drove away, leaving Mr. Champen on the side of the road.

111. The next day, Mr. Champen was seated on a bench near the corner of Main and Elm Streets in Oneonta with two friends, one white and one black. A Oneonta Police Department patrol car pulled up in front of Mr. Champen and his friends, and a policeman in the car told Mr. Champen and his black friend to approach the car.

112. After approaching the police car, Mr. Champen and his friend were told by the policeman to show their hands. Although Mr. Champen and his friend explained to the policeman that they had each already shown policemen their

hands previously, the policeman said not to give them any problems because they had already interviewed "about 450 other black guys" that day and didn't need any hassle. Mr. Champen and his friend then showed them their hands, and the police told them to leave the vicinity.

Sheryl Champen

113. At all times relevant to this action, Ms. Champen was an admissions counselor at the State University College at Oneonta, and had lived in Oneonta for 14 years.

114. On the afternoon of September 4, 1992, Ms. Champen had plans to travel from Oneonta to New York City to visit her grandmother over the Labor Day weekend.

115. As she stood in line to board the bus at the Oneonta bus station, a police car pulled up and parked near the bus. She was approached by a police officer who asked her to show him some identification. When Ms. Champen asked what for, the policeman stated that a black male had attempted a burglary earlier that day.

116. When Ms. Champen pointed out to him that he should be looking for a black male, the policeman said that if Ms. Champen wanted to board the bus, she would have to show him some identification.

117. Ms. Champen produced her driver's license for the policeman, who studied the license and gave it back to her. Only then was Ms. Champen allowed to board the bus and continue her journey.

Hopeton Gordon

118. On Saturday, September 5, 1992, Mr. Gordon had just returned to his dormitory room from an early morning class and was sleeping.

119. At approximately 10:00 o'clock in the morning, there was a loud banging at his suite door. Upon opening the door, he was confronted by four policeman, two in plain clothes, and two in uniform. At least some of the policemen had guns.

120. Without identifying themselves or explaining their presence, they asked Mr. Gordon where he was the night of September 3rd. Although Mr. Gordon initially told the policeman that the officer couldn't ask that question, the officer insisted he could. Mr. Gordon then told the officer that he had been at home.

121. One of the officers then told Mr. Gordon he wanted to look at Mr. Gordon's arm. When Mr. Gordon asked him why, the officer insisted on seeing Mr. Gordon's arm and asked if Mr. Gordon had anything to hide. Mr. Gordon was told that it was in his best interest to cooperate. Feeling that he had no choice, Mr. Gordon showed them his arms. Following this, the officers asked him numerous questions.

Jean Cantave

122. On September 4, 1992, between 7:30 and 8:00 in the evening, Mr. Cantave, a SUCO senior majoring in math and physics, was pulled over by an Oneonta policeman while

driving his car through the City of Oneonta towards the SUCO campus. The officer approached Mr. Cantave's car and asked to see a license, registration and Mr. Cantave's SUCO i.d. card.

123. After the officer had returned to his car and remained there for approximately 15 minutes, the officer returned and ordered Mr. Cantave out of the car. He then asked to see Mr. Cantave's hands. When Mr. Cantave asked the officer why he needed to see Mr. Cantave's hands, and asked him what he was looking for, the officer then ordered Mr. Cantave to put his hands on top of the car where they could be seen.

124. Several days later, Mr. Cantave learned that police had also come to his old apartment in Oneonta, asking to speak to him.

Raishawn Morris

125. On Saturday, September 5, 1992, Mr. Morris, a freshman received a call from a resident advisor, who was stationed in the lobby of the dormitory. The advisor asked Mr. Morris to come down to the lobby.

126. When Mr. Morris arrived in the lobby, he was met by two men dressed in plain clothes, who identified themselves as policemen.

127. One officer then said the wanted to see Mr. Morris' hands. When Mr. Morris asked why, the officer replied that a woman had been attacked by a "black guy" and the attacker had cut his hand. The policeman said they had to

inspect the hands of all black men.

Tim Richardson

128. On Friday, September 4, 1992, at approximately 5:30 p.m., Mr. Richardson, a Residence Director of a SUCO dormitory, had learned that some students were being questioned in his building. Mr. Richardson entered Room 27 of the building and asked what was going on when he saw two police officers there.

129. Detective Carl Shedlock of the Oneonta police asked, "Who the hell are you?" Tim Jackson, the uniformed SUCO Public Safety Officer, told Shedlock that Mr. Richardson was the dorm's Residence Director. Mr. Richardson told Shedlock that he wanted to know what was going on.

130. Shedlock opened his coat and Mr. Richardson saw his gun. Shedlock then displayed his badge, introduced himself and said, "I'm in charge of this investigation. If you've got a problem, settle it with me."

131. Shedlock stated why they were investigating and that they were questioning all black men and looking for cuts on their arms. He then said, "Well, what about you?" Mr. Richardson showed Shedlock his hands and then walked out.

132. On Monday afternoon, September 7, 1992, two officers from the Bureau of Criminal Investigation and Lt. Merritt Hunt of Public Safety approached Mr. Richardson as he was coming out of the Woolworth's on Main Street, Oneonta.

Mr. Richardson was asked to answer some questions about the incident that occurred on Friday.

133. Mr. Richardson stated that he had already showed his arms to a policeman on Friday. One of the investigators then asked, "Do you mind if I take a look at your arms?" Mr. Richardson asked whether they were going to arrest him. Mr. Richardson was then told, "If you give me a reason to, I will."

134. Mr. Richardson told the officer he didn't think he had a reason to arrest Mr. Richardson now, so he wasn't going to show his arms. Mr. Richardson stated to walk away, and an officer said "Let's not make this difficult."

135. Mr. Richardson gave his name and telephone number and told the officers who his boss was. When Mr. Richardson then walked into a crowed across the street, the officers followed him for a little while, and then said, "Well, we have your name, we'll get in contact with you at a later date."

Darryl Taylor

136. On Saturday, September 5, 1992, as Mr. Taylor was showering, his Residence Director called him on the phone and asked him to come down to speak with him about something important. Upon arriving, dressed only in a towel, Mr. Taylor was confronted by two Oneonta plain clothes policemen. One policeman's gun was visible.

137. The police asked Mr. Taylor questions about his

whereabouts early in the morning on Friday, September 4th, and asked to see his hands so they could look for cuts. Only after Mr. Taylor showed them his hands did the officer explain what they were investigating.

138. Mr. Taylor saw his name and the names of two other black males on a piece of paper in a folder carried by one of the officers carried. The officers did not explain why Mr. Taylor's name was on the list.

139. Immediately after the questioning, while outside his dorm with friends, all of whom were people of color, a Public Safety car and an unmarked police car pulled up. The police officer called Mr. Taylor over and asked if he had been interviewed.

140. The policemen then questioned a friend of Mr. Taylor. At that time, the officer said to Mr. Taylor, "Don't get involved with it," and then said, "Well, who are you, his lawyer, Mr. Know-It-All? Get out here before I arrest you for obstructing justice."

Robert Walker

141. One evening in early September of 1992, Mr. Walker was walking with a friend to the friend's apartment building. Upon arriving at the apartment building Mr. Walker saw a couple of police cars parked around the building and some policemen roaming around. There were a number of people in front of the building.

142. As they got near to the building, two policemen

approached Mr. Walker. One plainclothes policeman said, "Can I see the palms of your hands?" Mr. Walker asked who the officer was and was told that he was with the State Police doing an investigation. A uniformed police office then approached Mr. Walker. Mr. Walker then showed them his hands.

143. One of the officers grabbed Mr. Walker's hands and held them. Only then was Mr. Walker allowed to continue on his way.

Clement Mallory

144. In early September, the Residence Director of Mr. Mallory's dormitory came to his room and asked him to go downstairs to speak with a Public Safety officer and the State Police.

145. Upon arriving downstairs, Mr. Mallory was asked many questions such as "Where were you on Saturday night?", "What time did you get in from whatever club you went to?", "Who was with you?", by an officer wearing a gun, accompanied by a uniformed Public Safety Officer. Mr. Mallory was then asked to show them his hands.

Ronald Sanchez

146. On Friday, September 4, 1992, a approximately 9:00 a.m., Mr. Sanchez was sleeping in his dorm room. Mr. Sanchez heard someone banging on the door and told them to come in. Three plain-clothed officers opened the door to the dorm room, entered, and showed their badges.

147. They asked for Mr. Sanchez's name. Mr. Sanchez complied. The officers questioned why Mr. Sanchez's name was not on the list. They also asked questions concerning Mr. Sanchez's whereabouts earlier that morning, and whether he had been with his roommate.

148. The officers then asked Mr. Sanchez to show them his hands.

Darnell Lemons

149. On Friday, September 4, 1992, at approximately 2:00 p.m., while standing outside with a group of male and female friends, an unmarked police car pulled up beside Mr. Lemons.

150. After the police twice told Mr. Lemons to come over to the car, he complied. As the officers began to ask Mr. Lemons questions, he began to walk away. The police got out of the car and stopped Mr. Lemons and then questioned him there. The officers asked his name and checked his hands.

John Butler

151. On Friday, September 4, 1992, a approximately 2:00 or 3:00 p.m., Mr. Butler was sleeping in his dorm room. His roommate answered a knock on his door. Two policeman asked for Mr. Butler and the roommate let them in. Both policemen wore suits, and one, upon information and belief, was from the Oneonta Police Department.

152. The officers asked for Mr. Butler's name. One

officer came towards Mr. Butler's bed and stood there while he asked questions, while the other officer stood back.

153. The officer asked to see Mr. Butler's hands and asked where he had been the night before. The officers then asked "who else was black up there."

Michael Christian

154. On Saturday, September 5, 1992, Mr. Christian, a freshman, returned to his dorm room from a 9:00 a.m. class at about 10:00 a.m., and went back to sleep. As he was falling asleep, Mr. Christian heard a knock on his door.

155. He opened the door and saw upon information and belief, a Public Safety Officer, a detective, and a uniformed State Police Officer, wearing a gun, at the door.

156. Upon information and belief, it was the Public Safety Officer that stated that the police wanted to take Mr. Christina downtown to ask him some questions. After Mr. Christian refused to go downtown, the officers asked questions concerning Mr. Christian's whereabouts on September 4th. Mr. Christian was asked to show his hands, and was asked if his roommate was in.

King Gonzalez

157. On Friday, September 4, 1992, at approximately 9:00 a.m. Mr. Gonzalez was alone in his home when he heard a knock on his door. Mr. Gonzalez told whomever was knocking to come in. Upon information and belief, a State

Police officer and a City of Oneonta Police officer came into Mr. Gonzalez's home. Although neither was wearing a uniform, they identified themselves with their badges.

158. The officers asked Mr. Gonzalez's name and then checked his name off a list that they had. The officers asked Mr. Gonzalez where he had been the night of the incident and whether there was anyone who could confirm that information.

159. They also asked who were the other black people who lived in Mr. Gonzalez's house. The officers appeared to check each name off the list that they had. The officers also asked where those individuals were the night of the incident.

Jason Childs

160. One day in early September, 1992, as Mr. Childs, then a freshman, was in his dorm when approached by policemen and asked for his name. After identifying himself, Mr. Childs was asked "Can we see your hands?"

161. When Mr. Childs asked what for, one of the officers said, "Well just let me see yours hands." After Mr. Childs again asked why, officers explained that an elderly woman had been attacked, and she had described her attacker as a black male.

162. When Mr. Childs asked whether she had given a distinct description, because the officers would have to search many black males in order to find this guy, the officers told Mr.

Childs, "Don't get smart."

163. When Mr. Childs showed them one hand, he was told to show his other hand. Only then was he allowed to go upstairs to his dorm room.

Paul Heyward, Jr.

164. On September 4, 1992, at approximately 4:00 p.m., Mr. Heyward was in his dorm room with his girlfriend.

165. Answering a knock at the door, Mr. Heyward was confronted with three police officers, upon information and belief, one each from SUCO Public Safety, Oneonta Police Department, and the New York State Police.

166. Mr. Heyward was asked where he was the night before. An officer asked where Mr. Heyward worked and questioned him about a band-aid on his thumb.

167. Upon information and belief, the Public Safety Officer asked where Mr. Heyward got cut and whether anyone had witnessed the incident. The officers asked other questions including who was in the room with Mr. Heyward while he was sleeping, his roommate's name, his roommate's present location and where his roommate worked.

Ronald Jennings

168. On September 4, 1992, Mr. Jennings was a passenger in a car on Main Street, Oneonta. AS the car was pulling into the street, a police car stopped on the opposite side

of the street. Upon information and belief, two State Police got out and approached the car in which Mr. Jennings was sitting.

169. Mr. Jennings was asked to get out of the car and was searched. He was told to put his hands on the car, and one officer frisked him. He was then asked to show some identification. Although Mr. Jennings asked why he was being stopped, he was not answered until the officers finished frisking him.

170. Upon returning to his house, Mr. Jennings noticed police waiting there.

Paul Howe

171. In early September, Mr. Howe was summoned by, upon information and belief, two State Police officers, to come over to their car. The driver asked for Mr. Howe's name, school address, home address and date of birth. When Mr. Howe stopped answering his questions he was asked "why are you not cooperating."

172. When Mr. Howe turned away from them and did not answer questions, the officer asked to see his hands. After Mr. Howe refused, one of the officers approached him and asked "Do you have something to hide?" Mr. Howe said no, and showed his hands.

173. Later that day, while he was in the lobby with his residence director, Mr. Howe was told by Oneonta Police Officer Shedlock "By the way, let me see your hands."

Bubu Demasio

174. Late in the afternoon on Friday, September 4, 1992, as Mr. DeMasio came out of his dorm bathroom, he saw two police officers knocking on his dorm door. As he approached the door, an officer asked if he was Bubu DeMasio.

175. After identifying themselves as State Police, the officers told Mr. DeMasio that they were there to ask him a few questions.

176. As Mr. DeMasio opened the door to his room and stepped in, the officers followed him, although they did not ask permission to enter.

177. One policeman asked Mr. DeMasio if he was in town recently and, after he replied, "No," Mr. DeMasio was asked to show his hands.

Wilson Acosta

178. On a Saturday in September, 1992, while sitting in a lobby of his dorm with a fellow student, Mr. Acosta was approached by three policemen. Mr. Acosta recognized one of the officers as Carl Shedlock.

179. The three officers flashed their badges and asked Mr. Acosta to come over to them. They asked whether he knew that there had been an attack on a woman at 4:00 earlier that morning. They asked Mr. Acosta to show them his hands.

Chris Holland

180. On September 5, 1992, while en route to Pennsylvania with his college soccer team, the team bus stopped at Mr. Holland's house so he could pick something up that he had forgotten. As he was going up the stairs to his apartment building, two policemen in plain clothes stopped on top of the stairs.

181. The officers asked Mr. Holland to identify himself. The officers asked Mr. Holland to show his hands, and Mr. Holland questioned why. The officers answered that they needed to see his hands. Mr. Holland then showed them his hands, and then proceeded to get on the bus.

Jermaine Adams

182. On a Saturday in September 1992, while sitting in a lobby of his dorm with a fellow student, Mr. Adams was approached by three policemen.

183. The three officers showed their badges, questioned Mr. Adams and asked him to show them his hands.

Felix Francis

184. Mr. Francis was stopped while attempting to board a bus in or around Oneonta. Upon information and belief, he was told to remove his coat and show his arms to the officers before being allowed on the bus.

Daniel Sontag

185. In the afternoon of September 5, 1992, an unmarked police car followed Mr. Sontag and a white female friend around the campus as they walked. Upon reaching his dorm, he noticed a Public Safety car parked outside.

186. Mr. Sontag's roommate told him that SUCO Public Safety officers were looking for him.

187. A Public Safety officer, an Oneonta policeman who wore a gun, and two sheriffs then came to Mr. Sontag's room. All four officers entered his room without asking permission, and told Mr. Sontag to sit down. One officer was seated between Mr. Sontag and the door.

188. Mr. Sontag was asked questions about his hometown, address, birthdate, his whereabouts on September 4, how late he was out, and what time he arrived home. He was then asked to show his hands.

Ronald Lynch

189. In September 1992, Mr. Lynch answered a knock at his dorm room door and was confronted by, upon information and belief, Officer Shedlock in uniform, a uniformed Public Safety Officer, and a plain clothed detective. The three officers entered the room without asking permission and slammed the door behind him.

190. Mr. Lynch was asked his name by Officer Shedlock, who very quickly flashed his badge, and then asked

where Mr. Lynch was at 1:30 a.m. the night before. He then asked if Mr. Lynch had a roommate, whether the roommate was black and when would they be able to see this roommate. Mr. Lynch was told to get his roommate in here.

191. When the roommate came in the room, he was asked if Mr. Lynch was in the room sleeping at 1:30 a.m. the night before.

192. One of the officers told Mr. Lynch, "Let me see your hands," and Mr. Lynch complied. The officers did not explain why they questioned Mr. Lynch until after he showed them his hands.

Kenneth McClain

193. On or about September 4, 1992, the director of his dorm told Mr. McClain that there was a phone call and to come down to take it. When he arrived there, two plain clothed police were there instead, and told Mr. McClain they wanted to talk to him.

194. The officers first asked Mr. McClain's name and birthdate. The officers then said they wanted to see his hands. Although Mr. McClain asked why, he did not get an answer.

Hervey Pierre

195. At approximately 5:30 p.m. on Friday, September 4, 1992, Mr. Pierre was in his dorm room studying. He heard a knock on his door which was halfway open, and his name was called. He answered the door and saw, upon

information and belief, two uniformed Oneonta policemen and one State Policeman standing there.

196. As he opened his door and stood by it, the State Policeman asked Mr. Pierre where he was early in the morning on September 4th and who could verify his answer that he was in his room sleeping. With the police by his side, Mr. Pierre found a dormmate who told the police that he was asleep in his room during that time.

197. Only after the State Police asked Mr. Pierre to show them his hands, and he complied, did they explain what they were investigating.

Vincent Quinones

198. One morning in early September, 1992, two officers came to Mr. Quinones's apartment and knocked on the door. Mr. Quinones opened the door, and the officers asked for him by name. Because he had company and was not dressed yet, Mr. Quinones closed the door.

199. After he got dressed, came back to the door to open it, and went to step outside, the police pushed the door back open, and said that they wanted to talk to Mr. Quinones inside his apartment. Mr. Quinones said he didn't want to talk to them inside, but the officers said that they had to.

200. Once inside the apartment, the officers asked his name, age, and date of birth. They also asked where he had been at the time of an assault in the area. They then asked to see his hands.

201. The officers saw Mr. Quinones's girlfriend sleeping in the apartment and asked him to wake her up so that they could question her. They did not wait for her to get dressed but asked her the same questions that they had asked Mr. Quinones while she was still in her underwear.

202. Later that date, at approximately 6 p.m. or 7 p.m., Mr. Quinones was on the corner of Main Street and Elm Street in Oneonta, with two other friends eating pizza, and an Oneonta police car pulled over. The officers summoned him to the car and told him that they had to look at his hands.

203. Mr. Quinones refused to show his hands because he had already done so earlier in the morning. Mr. Quinones then walked away from the car. One of the police then said, "Well, we can bring you to the police station and do it that way if you don't want to just show them to us real quick." Mr. Quinones then showed his hands and the police car drove off.

Lawrence Plaskett

204. On the afternoon of Saturday, September 4, 1992, when Mr. Plaskett was boarding a Trailways bus at the Oneonta bus station, a uniformed State Police officer stopped him. As Mr. Plaskett tried to walk past the officer, the officer held his hand out and blocked the doorway, preventing Mr. Plaskett from boarding the bus.

205. The State policeman told Mr. Plaskett that he needed to check Mr. Plaskett's hands before he would let Mr. Plaskett get on the bus. He said, "I have to check your hands or you can't get the bus."

206. Mr. Plaskett refused to show his hands and asked why the officer needed to look at them. Mr. Plaskett then tried to pass the officer, but he put his hand up and crossed the doorway so Mr. Plaskett couldn't pass. After Mr. Plaskett showed the officer his hands, he was allowed to board the bus.

Lamont Wyche

207. On September 4, 1992, Mr. Wyche saw two police cars stop in front of McDuff Hall on the SUCO campus. He was approached by six police, two in uniform and four in shirts and ties. The officers asked Mr. Wyche his name.

208. After Mr. Wyche asked the officers why they wanted to know, he was told that they were looking for a black male. After Mr. Wyche told them his name and showed his hands, the officers checked a list to see if his name was on it.

Steven York

209. On September 4, 1992, as he was walking to the bus station in Oneonta, Mr. York noticed a policeman in a white car following him. When Mr. York arrived at the bus station, the policeman pulled behind a big truck.

210. After missing the bus, as Mr. York was walking home with a suitcase in his hand and a coat in his arms, he hard a car following him. The uniformed State Trooper in the car got Mr. York's attention and told him to stop.

211. The officer got out of his car, walked around the back of the car, and approached Mr. York. The officer stopped

approximately 4 or 5 feet away from Mr. York. The officer was about 5'8" tall and weighed approximately 175 pounds. He had short gray hair, styled in a crew cut, and appeared to be approximately 55 years old.

212. The officer asked Mr. York to take off the coat that was on Mr. York's left arm so that he could see the arm. The officer then asked Mr. York to hold out both arms. After the officer checked Mr. York's arms, he asked for some identification. Mr. York was stopped and questioned near an ice cream parlor in front of a number of people.

Tyrone Lohr

213. In the afternoon of September 4, 1992, Mr. Lohr, a 17-year old freshman, was in his dorm room sleeping. He heard a knock on the door, saw a head poke inside the door, and heard, "Hello."

214. Two police officers entered the room and displayed their badges. While standing at the foot of the bed, the State Police asked if he was Tyrone Lohr, and where Mr. Lohr had been at 2:00 a.m. that day.

215. While still in bed, Mr. Lohr was asked to show his hands.

216. The sole reason that each and every plaintiff was sought out, approached for questioning, seizure and/or search by the law enforcement officials was the color of plaintiffs' skin.

217. The investigating law enforcement officials lacked articulable or reasonable suspicion, much less probable cause, with respect to each and every individual approached, questioned, seized and/or searched.

218. Notwithstanding the City-wide "sweep," no suspect in the crime investigated has ever been apprehended.

219. Upon information and belief, the most recent activity in the investigation of the alleged assault was the filing of a supplemental investigative report by defendant Chandler on August 23, 1993.

220. On December 2, 1992, plaintiffs served upon defendant City of Oneonta a Notice of Claim pursuant to New York General Municipal Law §§ 50-e and 50-i.

AS AND FOR A FIRST CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS LAW ENFORCEMENT OFFICIALS

221. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 220 above, as if fully set forth herein.

222. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures under the Fourth Amendment to the Constitution of the United States. In addition, permissible conduct by law enforcement officials when involved in police-civilian encounters is clearly defined in the common law of the State of New York.

223. By seeking out, approaching, questioning, seizing and/or searching Ricky Brown, Jamel Champen, Sheryl Champen, Hopeton Gordon, Jean Cantave, Raishawn Morris, Tim Richardson, Darryl Taylor, Robert Walker, Clement Mallory, Ronald Sanchez, Darnell Lemons, John Butler, Michael Christian, King Gonzalez, Jason Childs, Paul Heyward, Jr., Ronald Jennings, Paul Howe, Bubu DeMasio, Wilson Acosta, Chris Holland, Jermaine Adams, Felix Francis, Daniel Sontag, Ronald Lynch, Kenneth McClain, Hervey Pierre, Vincent Quinones, Laurence Plaskett, Lamont Wyche, Steven York, Tyrone Lohr (hereinafter "named members of Class II") and all other persons comprising Class II without the requisite articulable suspicion, reasonable suspicion or probable cause, defendants law enforcement officials violated those plaintiffs' rights secured by the Fourth Amendment to the Constitution of the United States.

224. Defendants law enforcement officials' seeking out, approaching, questioning, seizing and/or searching of plaintiffs were based, not on any requisite level of suspicion, but solely upon plaintiffs' race.

225. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

226. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because

of their race.

227. Defendants law enforcement officials' violations of the rights of the named members of Class II, and all other persons comprising Class II under the Fourth Amendment to the United States Constitution, were motivated by racial animus and deprived those plaintiffs of the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens, and subjected them to different punishment, pains and penalties because of their race, in violation of 42 U.S.C. § 1981.

AS AND FOR A SECOND CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS LAW ENFORCEMENT OFFICIALS

228. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 227 above, as if fully set forth herein.

229. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures under the Fourth Amendment to the Constitution of the United States. In addition, permissible conduct by law enforcement officials when involved in police-civilian encounters is clearly defined in the common law of the State of New York.

230. Upon information and belief, defendants law enforcement officials have not, during the investigation of crime in which the suspect was described as a white male attempted to seek out, approach, question, seize and/or search

every white male in and around Oneonta, New York.

231. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

232. By seeking out, approaching, questioning, seizing and/or searching the named members of Class II and all other persons comprising Class II solely on the basis of their race and not based upon the appropriate level of suspicion as required by New York law, defendants law enforcement officials denied them equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

233. Defendants law enforcement officials' violations of the rights of the named members of Class II, and all other persons comprising Class II under the Fourteenth Amendment, were motivated by racial animus and deprived those plaintiffs of the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens, and subjected them to different punishment, pains and penalties because of their race, in violation of 42 U.S.C. § 1981.

AS AND FOR A THIRD CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS LAW ENFORCEMENT OFFICIALS

234. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 233 above, as if fully set

forth herein.

235. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures and permissible conduct by law enforcement officials when involved in police-civilian encounters, under New York State Constitution Article I, § 12, New York Civil Rights Law § 8, and the common law of the State of New York.

236. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

237. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contract to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

238. By seeking out, approaching, questioning, seizing and/or searching the named members of Class II, and all other persons comprising Class II without the requisite articulable suspicion, reasonable suspicion or probable cause, defendants law enforcement officials violated the rights secured to these plaintiffs by New York State Constitution Article I, § 12, New York Civil Rights Law § 8, and New York common law.

239. Defendants law enforcement officials' seeking out, approaching, questioning, seizing and/or searching of the

named members of Class II, and all other persons comprising Class II were based, not on any requisite level of suspicion, but solely upon plaintiffs' race.

240. Defendants law enforcement officials' violations of the rights of the named members of Class II, and all other persons comprising Class II under New York State Constitution Article 1, § 12, New York Civil Rights Law § 8 and New York common law were motivated by racial animus and deprived those plaintiffs of the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens, and subjected them to different punishment, pains and penalties because of their race, in violation of 42 U.S.C. § 1981.

AS AND FOR A FOURTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS LAW ENFORCEMENT OFFICIALS

241. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 240 above, as if fully set forth herein.

242. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures and permissible conduct by law enforcement officials when involved in police-civilian encounters, under Article 1, § 12 of the New York State Constitution, New York Civil Rights Law § 8 and the common law of the State of New York.

243. Upon information and belief, defendants law

enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

244. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

245. By seeking out, approaching, questioning, seizing and/or searching the named members of Class II, and all other persons comprising Class II solely on the basis of their race and not based upon the appropriate level of suspicion required by New York law, defendants law enforcement officials denied them the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

246. Defendants law enforcement officials' violations of the rights of the named members of Class II, and all other persons comprising Class II under the Fourteenth Amendment, were motivated by racial animus and deprived those plaintiffs of the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens, and subjected them to different punishment, pains and penalties because of their race, in violation of 42 U.S.C. § 1981.

AS AND FOR A FIFTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS LAW ENFORCEMENT OFFICIALS

247. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 246 above, as if fully set forth herein.

248. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures and permissible conduct by law enforcement officials when involved in police-civilian encounters under Article 1, § 12 of the New York State Constitution, New York Civil Rights Law § 8 and the common law of the State of New York.

249. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

250. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

251. By seeking out, approaching, questioning, seizing and/or searching the named members of Class II, and all other persons comprising Class II solely on the basis of their race and not based upon the appropriate level of suspicion

required by New York law, defendants law enforcement officials denied them the equal protection of the laws under Article 1, § 11 of the New York Constitution and New York Civil Rights Law § 40-c.

252. Defendants law enforcement officials' violations of the rights of the named members of Class II, and all other persons comprising Class II under Article 1, § 11 of the New York State Constitution and New York Civil Rights Law § 40-c, were motivated by racial animus and deprived those plaintiffs of the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens, and subjected them to different punishment, pains and penalties because of their race, in violation of 42 U.S.C. § 1981.

AS AND FOR A SIXTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANT CITY OF ONEONTA

253. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 252 above, as if fully set forth herein.

254. The City of Oneonta is a suable person within the meaning of 42 U.S.C. § 1981.

255. The seeking out, approach, questioning, seizure and/or search of each and every of the Class II plaintiffs constituted multiple incidents evidencing the custom and policy of the City of Oneonta that resulted in the denial to those plaintiffs of the full and equal benefit of all laws and

proceedings for the security of persons as is enjoyed by white citizens, and subjected those plaintiffs to different punishment, pains and penalties because of their race, all in violation of 42 U.S.C. § 1981.

256. In the alternative, if the "sweep" constituted only one incident, the incident was caused by an existing, unconstitutional municipal policy attributable to the relevant policymaker for the City of Oneonta.

257. Upon information and belief, Oneonta Policy Chief Donadio is the municipal policymaker concerning police conduct during criminal investigations and police conduct during police-civilian encounters in general.

258. Moreover, Chief Donadio, possessing the final policymaking authority as to the conduct of his officers, ratified the manner of the investigation conducted by the defendants police officers and investigators of the Police Department of the City of Oneonta. Such ratification evidences a policy and custom of the City of Oneonta.

259. Prior instances of similar police misconduct including, upon information and belief, the investigation of a rape that occurred on the SUCO campus in late April or early May 1992, also reflect a custom and policy of the City of Oneonta.

260. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search

every white male in and around Oneonta, New York.

261. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

262. The custom and policy of the City of Oneonta, as alleged herein, caused the injuries suffered by the named members of Class II, and all other persons comprising Class II plaintiffs, thereby depriving these plaintiffs of the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens, and subjected them to different punishment, pains and penalties because of their race, in violation of 42 U.S.C. § 1981.

AS AND FOR A SEVENTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AGAINST DEFENDANTS CHANDLER, FARRAND, CLUM, MORE, WAY, KIMBALL, GRANT, FARRAGO AND ANONYMOUS STATE POLICE OFFICERS AND INVESTIGATORS

263. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 262 above, as if fully set forth herein.

264. At all times relevant herein defendants Chandler, Farrand, Clum, More, Way, Kimball, Grant, Farrago and Anonymous State Police Officers and Investigators acted under color of the laws of New York State.

265. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures and permissible conduct by law enforcement officials when involved in police-civilian encounters, under the Fourth Amendment to the Constitution of the United States and the New York Constitution, statutes and common law.

266. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

267. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

268. By seeking out, approaching, questioning, seizing and/or searching the named members of Class II and all other persons comprising Class II solely on the basis of their race and not based upon the appropriate level of suspicion as required by New York law, defendants have subjected these plaintiffs, and/or caused these plaintiffs to be subjected, to the deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States, to wit: (a) their rights under the Fourth Amendment to be free from unreasonable governmental intrusion and unreasonable searches and/or seizures, and (b) their rights under the Fourteenth Amendment to the equal protection of the laws,

which rights include protection from unequal and discriminatory application of the principles of the common law of the State of New York governing police-civilian encounters, all in violation of 42 U.S.C. § 1983.

269. The actions of these defendants evidence a reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiffs to an award of punitive damages.

AS AND FOR AN EIGHT CAUSE OF ACTION ON BEHALF OF CLASS I PLAINTIFFS AS AGAINST DEFENDANTS LEIF HARTMARK, ERIC WILSON, AND ANONYMOUS SUCO COMPUTER EMPLOYEES

270. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 269 above, as if fully set forth herein.

271. At all times relevant herein, defendants Leif Hartmark, Eric Wilson and Anonymous SUCO Computer Employees acted under color of the laws of New York State, and purportedly pursuant to the authority delegated to them as employees of the State of New York and SUCO.

272. The creation and dissemination, by defendants, Leif Hartmark, Eric Wilson and Anonymous SUCO Employees, of the computer-generated list of male African-American SUCO students, violated the Family Educational Privacy and Rights ACT ("FEPRA"), 20 U.S.C. § 1232g and 34 C.F.R. §§ 99.1-99.67.

273. The acts of these defendants subjected Major Barnett, Charles Battiste, Kevin Allen, Wayne Lewis and all other persons comprising Class I, and/or caused these plaintiffs to be subjected, to the deprivation of plaintiffs' rights under FEPRA, in violation of 42 U.S.C. § 1983.

274. The actions of these defendants evidence a reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiffs to an award of punitive damages.

AS AND FOR A NINTH CAUSE OF ACTION ON BEHALF OF CLASS I PLAINTIFFS AS AGAINST DEFENDANTS HUNT, CHANDLER, SHEDLOCK, HARTMARK, WILSON, ANONYMOUS SUCO COMPUTER EMPLOYEES, AND OTHERS AS YET UNIDENTIFIED

275. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 274 above, as if fully set forth herein.

276. Upon information and belief, defendants Hunt, Chandler, Shedlock, Hartmark, Wilson, Anonymous SUCO Computer Employees, and others as yet unidentified, conspired to violate the rights, under FEPRA, of Major Barnett, Charles Battiste, Kevin Allen, Wayne Lewis and all other persons comprising Class I.

277. Upon information and belief, defendants Shedlock and Hunt, at the direction of defendant Chandler, contacted defendants Wilson and Hartmark and others as yet

unidentified, to obtain a computer-generated list of all the male African-American students at SUCO.

278. These defendants conspired to generate, obtain and utilize the list to aid in the wrongful approaches, questioning, seizing and/or searching of the SUCO students listed, all in violation of FEPRA.

279. The acts committed by these defendants in furtherance of their conspiracy include, but are not limited to the following:

(a) Defendant Chandler's instructions to obtain the list;

(b) Defendant Shedlock's contacting of defendant Hunt to obtain the list;

(c) Defendants Shedlock's and Hunt's contacting defendants Wilson and Hartmark to obtain the list;

(d) Defendants Wilson's and other as-yet unnamed defendants' generation of the list;

(e) Defendant Hartmark's approval and authorization of the release of the list to the defendants law enforcement officials;

(f) The receipt of the list by defendants

Shedlock and Hunt;

(g) The use of the list by defendants Chandler, Way and others as-yet unnamed to input the names into State Police computers and then creating computer "lead sheets" for each law enforcement official who thereafter sought out male African-American SUCO students for questioning;

(h) The use of the list and lead sheets by defendants law enforcement officials during the subsequent questioning of the male African-American SUCO students; and

(i) The use of the list and lead sheets by defendants law enforcement officials during the subsequent "sweep" of the City of Oneonta.

280. This conspiracy to violate plaintiffs' rights secured under FEPRA constitutes a violation of 42 U.S.C. § 1983.

281. All persons otherwise subject to the protections afforded by FERPA are similarly situated with respect to such rights regardless of their race. Upon information and belief, defendants have not, during the investigation of a crime in which the suspect was described a white male, conspired to generate, obtain and utilize a list of all white male students of

SUCO.

282. By targeting all African-American male students at SUCO as suspects and by conspiring to generate, obtain and utilize a list of all African-American male students at SUCO in violation of FERPA, thereby singling out the members of Class I by defendants for unlawful oppression in contrast to similarly situated white, non-minority SUCO students, defendants violated plaintiffs' rights under the Fourteenth Amendment to the equal protection of the laws.

283. The actions of these defendants evidence a reckless and callous disregard of, and indifference to, the rights of plaintiffs', entitling plaintiffs to an award of punitive damages.

AS AND FOR A TENTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS, DONADIO, SHEDLOCK, REDMOND, DAVIS, OLSEN AND ANONYMOUS OFFICERS AND INVESTIGATORS OF THE POLICE DEPARTMENT OF THE CITY OF ONEONTA

284. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 283 above, as if fully set forth herein.

285. At all times relevant herein defendants Donadio, Shedlock, Redmond, Davis, Olsen and Anonymous Officers and Investigators of the Police Department of the City of Oneonta acted under color of the laws of New York State, and

pursuant to the authority delegated to them by the City of Oneonta.

286. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures and permissible conduct by law enforcement officials when involved in police-civilian encounters under the Fourth Amendment to the Constitution of the United States and the New York Constitution, statutes and common law.

287. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

288. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

289. By seeking out, approaching, questioning, seizing and/or searching the named members of Class II and all other persons comprising Class II solely on the basis of their race and not based upon the appropriate level of suspicion as required New York law, defendants have subjected these plaintiffs, and/or caused these plaintiffs to be subjected, to the deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States to wit: (a) their rights under the Fourth Amendment to be free from unreasonable governmental intrusion and unreasonable

searches and/or seizures, and (b) their rights under the Fourteenth Amendment to the equal protection of the laws, which rights include protection from unequal and discriminatory application of the principles of the common law of the State of New York governing police-civilian encounters, all in violation of 42 U.S.C. § 1983.

290. The actions of these defendants evidence a reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiffs to an award of punitive damages.

AS AND FOR AN ELEVENTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS HUNT, JACKSON, EDMONDSON AND ANONYMOUS PUBLIC SAFETY OFFICERS

291. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 290 above, as if fully set forth herein.

292. At all times relevant herein defendants Hunt, Jackson, Edmondson and Anonymous Public Safety Officers acted under color of the laws of New York State, and acted or purported to act pursuant to the authority delegated to them as Public Safety Officers of SUCO.

293. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures and permissible conduct by law enforcement officials when involved in police-civilian encounters under the Fourth Amendment to the Constitution of the United States and

the new York Constitution, statutes and common law.

294. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

295. The named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

296. By seeking out, approaching, questioning seizing and/or searching the named members of Class II and all other persons comprising Class Ii solely on the basis of their race and not based upon the appropriate level of suspicion as required by New York law, defendants have subjected these plaintiffs, and/or caused these plaintiffs to be subjected, to the deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States, to wit: (a) their rights under the Fourth Amendment to be free from unreasonable governmental intrusion and unreasonable searches and/or seizures, and (b) their rights under the Fourteenth Amendment to the equal protection of the laws, which rights include protection from unequal and discriminatory application of the principles of the common law of the State of New York governing police-civilian encounters, all in violation of 42 U.S.C. § 1983.

297. The actions of these defendants evidence a

reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiff to an award of punitive damages.

AS AND FOR A TWELFTH CAUSE OF ACTION ON BEHALF OF ALL PLAINTIFFS AS AGAINST ALL INDIVIDUAL DEFENDANTS

298. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 297 above, as if fully set forth herein.

299. All individual defendants, while acting under color of law, participated in a conspiracy to violate the rights, privileges and immunities secured to all plaintiffs by the Constitution and laws of the United States, in violation of 42 U.S.C. § 1983.

300. The individual defendants agreed to and did commit acts in furtherance of this conspiracy including but not limited to: (a) the generation and dissemination of the list of all male African-American SUCO students; (b) the subsequent seeking out, approach, questioning, seizure and/or search of the SUCO students so identified; (c) the subsequent "sweep" in and around the City of Oneonta by the law enforcement officials, at the direction of, upon information and belief, defendant Chandler, and with the knowledge and cooperation of Oneonta Police Chief Donadio.

301. Acts committed in furtherance of the conspiracy include, but are not limited to, those acts set forth above in paragraph 279 of this Complaint.

302. The actions of these defendants evidence a reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiffs to an award of punitive damages.

AS AND FOR A THIRTEENTH CAUSE OF ACTION ON BEHALF OF ALL PLAINTIFFS AS AGAINST ALL INDIVIDUAL DEFENDANTS

303. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 302 above, as if fully set forth herein.

304. The City of Oneonta is a suable person within the meaning of 42 U.S.C. § 1983.

305. The seeking out, approach, questioning, seizure and/or search of each and every of the Class II plaintiffs constituted multiple incidents evidencing the custom and policy of the City of Oneonta that resulted in the denial of those plaintiffs' rights secured by the Constitution and laws of the United States, in violation of 42 U.S.C. § 1983.

306. In the alternative, if the "sweep" constituted only one incident, the incident was caused by an existing, unconstitutional municipal policy attributable to the relevant policymaker the City of Oneonta.

307. Upon information and belief, Oneonta Police Chief Donadio is the municipal policymaker concerning police conduct during criminal investigations and police conduct during police-civilian encounters in general.

308. Moreover, Chief Donadio, possessing the final policymaking authority as to the conduct of his officers, ratified the manner of the investigation conducted by the defendants police officers and investigators of the Police Department of the City of Oneonta.

309. Prior instances of similar police misconduct including upon information and belief, the investigation of a rape that occurred on the SUCO campus in late April or early May 1993, also reflect a custom and policy of the City of Oneonta.

310. The custom and policy of the City of Oneonta, as alleged herein, caused Class II plaintiffs' injuries, in violation of 42 U.S.C. § 1983.

AS AND FOR A FOURTEENTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AGAINST DEFENDANT CITY OF ONEONTA

311. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 310 above, as if fully set forth herein.

312. As set forth above, plaintiffs allege that the custom and policy of the City of Oneonta, as evidenced by the acts of its policy officers and investigators in this case, as well as pursuant to a policy created and/or ratified by Chief Donadio, subject the named members of Class II, and all other persons comprising Class II, and/or caused these plaintiffs to be subjected, to the deprivation of rights, privileges and

immunities secured by the Constitution and laws of the United States.

313. Plaintiffs further allege that the City of Oneonta failed to adequately train and/or supervise the police officers and investigators of the Police Department of the City of Oneonta with respect to permissible conduct by those officers when performing their criminal investigation and law enforcement functions and participating in police-civilian encounters.

314. The failure of the City of Oneonta to properly train and/or supervise its police officers and investigators constituted deliberate indifference to the rights of plaintiffs, and caused plaintiffs to be subjected to the constitutional, statutory and common law violations complained of herein.

315. In addition, the failure of the City of Oneonta to adequately train and supervise its police officers with respect to these matters is, upon information and belief, evidenced by a prior history of Oneonta police officers mishandling police-civilian encounters.

316. The police officers involved in seeking out, approaching, questioning, seizing and/or searching of the named members of Class II, and all other persons comprising Class II, did not possess the requisite level of suspicion to justify their intrusion on the rights of these plaintiffs. The failure of the City of Oneonta to adequately train and supervise its police officers in the area of police-civilian encounters has resulted in te deprivation fo rights complained of herein, and thereby violated these plaintiffs' rights under 42 U.S.C. § 1983.

AS AND FOR A FIFTEENTH CAUSE OF ACTION ON BEHALF OF ALL PLAINTIFFS AS AGAINST ALL DEFENDANTS EXCEPT THE STATE OF NEW YORK, THE STATE UNIVERSITY OF NEW YORK, SUCO, SUCO DEPARTMENT OF PUBLIC SAFETY AND THE NEW YORK STATE POLICE

317. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 316 above, as if fully set forth herein.

318. The defendants conspired to (a) create, disseminate and utilize a list of all male African-American students at SUCO, including Major Barnett, Charles Battiste, Kevin Allen, Wayne Lewis and all other persons comprising Class I and (b) to conduct a "sweep" in and around the City of Oneonta pursuant to which the named members of Class II, and all other persons comprising Class II were approached, questioned, seized and/or searched.

319. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, (a) generated, obtained and/or utilized a list of all white male students of SUCO, or (b) attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

320. The named Plaintiffs and all other persons comprising both Class I and Class II were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated

differently because of their race.

321. The acts of defendants deprived the non-white members of the communities of SUCO and the City of Oneonta of the equal protection of the laws, and plaintiffs' civil rights under the Constitutions and laws of the United States and New York State, to be free of unreasonable governmental intrusion and to be secure in their persons and their property.

322. The defendants, motivated by racial animus, committed many acts in furtherance of this conspiracy, including the generation of the list, the creation of computer-generated "lead sheets" given to individual officers listing SUCO students to be questioned, and the "sweep" in and around the City of Oneonta which included the approaching, questioning, seizing and/or searching of the named members of Class II, and all other persons comprising Class II without the requisite level of suspicion to justify such actions.

323. The acts complained of herein constitute a violation of 42 U.S.C. § 1985(3). Plaintiffs suffered, and continue to suffer, extreme embarrassment, anguish, humiliation, emotional trauma and a profound loss of dignity as a result of the acts of defendants.

324. The actions of these defendants evidenced a reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiffs to an award of punitive damages.

AS AND FOR A SIXTEENTH CAUSE OF ACTION ON BEHALF OF ALL PLAINTIFFS AS AGAINST DEFENDANTS CHANDLER AND DONADIO

325. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 324 above, as if fully set forth herein.

326. Defendants Donadio and Chandler, having knowledge of the conspiracy alleged in the fifteen the cause of action of this complaint, paragraph 317-324 above, and having power to prevent or aid in preventing the commission of the conspiracy alleged therein, neglected, failed and, upon information and belief, refused to prevent or aid in the prevention of said conspiracy.

327. The failure of defendants Donadio and Chandler to prevent or aid in the prevention of the conspiracy constitutes a violation of 42 U.S.C. § 1986.

AS AND FOR A SEVENTEENTH CAUSE OF ACTION ON BEHALF OF ALL PLAINTIFFS AS AGAINST DEFENDANTS STATE OF NEW YORK, STATE UNIVERSITY OF NEW YORK, SUCO, SUCO DEPARTMENT OF PUBLIC SAFETY, NEW YORK STATE POLICY, CITY OF ONEONTA, AND POLICE DEPARTMENT OF THE CITY OF ONEONTA

328. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 327 above, as if fully set forth herein.

329. Defendants State of New York, State University of New York, SUCO, SUCO Department of Public Safety, New York State Police, City of Oneonta, and Police Department of the City of Oneonta, are "programs or activities" under Title VI, 42 U.S.C. §§ 2000d *et seq*.

330. Upon information and belief, these defendants receive federal financial assistance.

331. The actions of these defendants, as alleged herein, constituted unlawful and intentional discrimination against plaintiffs, in violation of 42 U.S.C. § 2000d.

SUPPLEMENTAL STATE CLAIMS

AS AND FOR AN EIGHTEENTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANT LAW ENFORCEMENT OFFICIALS

332. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 331 above, as if fully set forth herein.

333. Defendants law enforcement officials' seeking out, approaching, questioning, seizing and/or searching of the named members of Class II, and all other persons comprising Class II, were based, not on any requisite level of suspicion but, due to these defendants' racial animus, solely upon plaintiffs' race.

334. By seeking out, approaching, questioning,

seizing and/or searching the named members of Class II, and all other persons comprising Class II without the requisite articulable suspicion, reasonable suspicion or probable cause, defendants law enforcement officials violated the plaintiffs' rights secured by Article 1, § 12 of the New York State Constitution, and New York Civil Rights Law § 8 and the common law of the State of New York.

335. The actions of these defendants evidence a reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiffs to an award of punitive damages.

AS AND FOR A NINETEENTH CAUSE OF ACTION ON BEHALF OF CLASS II PLAINTIFFS AS AGAINST DEFENDANTS LAW ENFORCEMENT OFFICIALS

336. Plaintiffs repeat and reallege the allegations contained in paragraph 1 through 335 above, as if fully set forth herein.

337. All persons in New York, regardless of race, are similarly situated with respect to the law governing searches and seizures and permissible conduct by law enforcement officials when involved in police-civilian encounters, under New York State constitutional, statutory and common law.

338. Under such governing law, no person may be treated as a criminal suspect absent an appropriate level of suspicion, which suspicion may not be based solely on race. Nor does governing law allow treatment of a class of persons as a "class of suspects" based solely on race.

339. Upon information and belief, defendants law enforcement officials have not, during the investigation of a crime in which the suspect was described as a white male, attempted to seek out, approach, question, seize and/or search every white male in and around Oneonta, New York.

340. As set forth in the factual allegations and claims in this complaining, the named members of Class II, and all other persons comprising Class II, were singled out by defendants for unlawful oppression in contrast to similarly situated white, non-minority persons, and therefore were treated differently because of their race.

341. By seeking out, approaching, questioning, seizing and/or searching the named members of Class II, and all other persons comprising Class II solely on the basis of plaintiffs' race and not based upon the appropriate level of suspicion as required by New York law, defendants law enforcement officials denied these plaintiffs the equal protection of the laws under Article 1, § 11 of the New York State Constitution and New York Civil Rights Law § 40-c.

342. The actions of these defendants evidence a reckless and callous disregard of, and indifference to, the rights of plaintiffs, entitling plaintiffs to an award of punitive damages.

AS AND FOR A TWENTIETH CAUSE OF ACTION ON BEHALF OF ALL PLAINTIFFS AS AGAINST DEFENDANT THE CITY OF ONEONTA

343. Plaintiffs repeat and reallege the allegations contained in paragraph 1 through 342 above, as if fully set forth herein.

344. The City of Oneonta has a duty to properly train its law enforcement officials with respect to police-civilian encounters, to ensure that said law enforcement officials act within constitutional, statutory and common law constraints during such encounters with any and all persons with whom the law enforcement officials may come in contact.

345. The City of Oneonta breached its duty to plaintiffs by negligently failing to adequately train and/or supervise the police officers and investigators of the Police Department of the City of Oneonta with respect to permissible conduct by those officers when performing their criminal investigation and law enforcement functions and participating in police-civilian encounters.

346. The negligent failure of the City of Oneonta to properly train and/or supervise its police officers and investigators caused plaintiffs to be subject to the constitutional, statutory and common law violations complained of herein, and to thereby suffer damages.

WHEREFORE, plaintiffs request judgment against all defendants:

(a) Declaring that this action may be maintained as a class action.

(b) Awarding compensatory damages in an amount to be established at trial.

(c) Awarding punitive damages for the First through Fifth, Seventh through Twelfth, Fifteenth, Eighteenth and Nineteenth Causes of Action;

(d) Entitling each Class I plaintiff to designate a person of his choice to attend without charge, a college in the State University of New York system, so long as the person chosen otherwise meets the admission requirements of the college;

(e) Reasonable attorney's fees pursuant to 42 U.S.C. § 1988 and pursuant to law governing class actions;

(f) Expenses, costs and disbursements of this action;

(g) Such other and further relief as the Court may deem just and proper.

Dated: Albany, New York
January 30, 1995

WHITEMAN OSTERMAN & HANNA

BY: _____

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

February 12, 2001

Mr. Scott N. Fein
Whiteman, Osterman & Hanna
One Commerce Plaza
Albany, NY 12260

Re: Ricky Brown, etc., et al.
v. City of Oneonta, et al.
Application No. 00A700

Dear Mr. Fein:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on February 12, 2001, extended the time to and including May 17, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/
Loretta S. Ruffin
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

NOTIFICATION LIST

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Clerk
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1702 US Courthouse, Foley Sq.
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Office of the Attorney General
Washington, D.C. 20530

February 28, 2001

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington DC 20510

Dear Mr. Chairman:

As you know, I received a directive from the President late yesterday asking me to work with Congress to develop effective methods to determine the extent to which law enforcement officers in the United States engage in the practice of racial profiling. As you further know, racial profiling is the use of race as a factor in conducting stops, searches, and other investigative procedures. While we all recognize that the overwhelming majority of law enforcement officers perform their demanding jobs in an outstanding manner, any practice of racial profiling, even by a small minority, is unacceptable.

You may recall that during the hearing I held on the subject last year as a Senator, I stated that racial profiling, even if practiced only by a few, is extremely problematic for two reasons. First, it undermines the public trust in the impartiality

of law enforcement officers which is essential to effective law enforcement. Second, and more importantly, I personally believe such a practice violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution. I share the President's commitment to ending any unequal treatment of Americans, particularly by law enforcement.

To this end, I urge you in your capacity as Chairman of the Judiciary Committee to consider quickly legislation authorizing the Department of Justice to conduct a study of traffic stops data that currently is being collected voluntarily by law enforcement agencies across the country. Such a study will assist us in determining the extent of the problem of racial profiling.

The Traffic Stops Statistics Study Act introduced last Congress by Congressman Conyers in the House, and proposed by Senator Feingold in the Senate, is an excellent starting place for such an enterprise. I would hope that any legislation you consider makes clear that such information is provided voluntarily, in order to quell any potential federalism concerns. Such legislation ought to permit consideration of broad categories of data, such as the reasons and circumstances of any stop, the identifying characteristics of the driver and passengers as perceived and discernable by the officer making the stop, the characteristics of the officer making the stop, the racial or ethnic composition of the area in which the stop was made, and any other data that will ensure as full a picture as possible of these contacts, such as arrest and conviction outcomes linked to traffic stops. In order to encourage participation, the legislation hopefully will make clear that the legislation will

not change the burdens or standards of proof in any lawsuits. The legislation, therefore, would lend to a better study, by emphasizing the importance and seriousness of the issue while, at the same time, encouraging cooperation.

I am eager to begin work on this important task, and hope that Congress will consider such legislation quickly. If Congress is unable to authorize such a study in 6 months, I will instruct the Department to begin promptly its own study of available data. I look forward to working with you on this important issue to ensure that all Americans are guaranteed equal justice under law.

Sincerely,

/s/

John Ashcroft
Attorney General

No. 00-1728

Supreme Court, U.S.
JUL 17 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICKY BROWN, *et al.*,

Petitioners,

v.

CITY OF ONEONTA, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF NEW YORK STATE RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether law enforcement officials investigating a specific crime in which the victim gave a specific description of her assailant violated the Equal Protection Clause by seeking to question all individuals in a geographic area fitting that description.

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II. The question proffered by plaintiffs is not fairly presented by the pleadings in this case. 10

III. This case does not present an opportunity for the Court to address the constitutionality of racial profiling. 14

IV. Plaintiffs have now sought permission to file a third amended complaint rendering the issue unripe for review by this Court. 16

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The State respondents respectfully submit this brief in opposition to plaintiffs' petition for a writ of certiorari.[1] The petition raises fact-bound issues and seeks review of a decision that relies on settled legal principles and which is not in conflict with any decision of this Court or with any decision of the circuit courts of appeal. The petition should be denied.

STATEMENT OF THE CASE

Oneonta is a small city in upstate New York located about seventy miles southwest of Albany. It has about 10,000 full-time residents who, for the most part, are white (A-7). Fewer than 300 of the 10,000 full-time residents are black (A-7). In addition to the full-time residents of the City, about 7,500 students attend and reside at the State University of New York College of Oneonta ("SUCO"), which sits on a hill within the City boundary (A-7). Just two percent, or roughly 150, of the SUCO students are black (A-7).[2]

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1. The State respondents consist of the State of New York, the State University of New York, College at Oneonta, the Division of State Police, individual state law enforcement officers, and individual employees of the New York State University College at Oneonta; the City respondents consist of the City of Oneonta and individual city law enforcement officers and employees; and the County defendants consist of individual Otsego County law enforcement officers and employees.

2. This demographic information is found in the decision of the Court of Appeals. SUCO records show that in 1992, about 5700 students were enrolled, of whom 2.3%, or approximately 131 students, were black.

On September 4, 1992, shortly before 2:00 a.m., someone broke into a private home located immediately outside the City of Oneonta and in close proximity to the SUCO campus (A-142). The assailant attacked a 77-year-old woman who was a guest in the home. Based on the description of the assailant given by the victim, which consisted largely of race and gender, the law enforcement respondents attempted to question all black male SUCO students and other persons in the Oneonta community (A-142-143).

As alleged in the second amended complaint, the victim told the State Police, and the City of Oneonta Police who assisted in the investigation, that she could not see her assailant's face, "but believed he was black because he had a dark hand or lower forearm"; that "she believed [he] was young because he ran quickly across the room"; and that both she and her assailant "were superficially cut with a knife the assailant brandished during the attack" and thus that the assailant may have a cut on his arm (A-162-163). A police canine unit tracked the assailant's scent from the scene of the crime toward the base of the SUCO campus, but lost the trail after several hundred yards (A-113).

The second amended complaint alleged further that law enforcement officers conducted their investigation as follows:

- They immediately contacted local hospitals and pharmacies to determine if a non-white male sought treatment for a cut (A-163).

- They obtained from SUCO a list of its black male students, and attempted to locate and question every student on that list, as well as black faculty and staff (A-163-164).

- They also attempted to interview black students at nearby Hartwick College and the Federal Job Corps Center in Oneonta (A-164).

- "Having failed to apprehend a suspect, * * * [defendants] beg[a]n a city-wide sweep" during which the "police made an effort to question and physically examine all non-white males in Oneonta" (A-165).

Plaintiffs, consisting of thirty-four black male SUCO students, two other black males, and one black female, allege under 42 U.S.C. § 1983 that the actions of the law enforcement defendants violated their rights under the Fourth Amendment and Equal Protection Clauses of the United States Constitution, 42 U.S.C. § 1981, and various other federal and state statutes. The district court denied plaintiffs' motion for class certification for "as many as 300" persons who were stopped and questioned by police during the investigation (A-154).[3]

Defendants made a series of motions requesting dismissal of certain claims on the pleadings or summary judgment. Plaintiffs cross-moved for summary judgment.

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3. Plaintiffs were granted class certification with respect to their claims under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, on behalf of all 78 students whose names appeared on the list provided by SUCO, but their FERPA claims were dismissed on qualified immunity grounds. *See Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997).

A. Decisions of the District Court

Ultimately the district court dismissed, with leave to replead, plaintiffs' Equal Protection claims because the complaint failed to allege that defendants treated plaintiffs differently from other similarly situated persons (A-124-128). It dismissed their claims under 42 U.S.C. § 1981 for the same reason. The district court granted defendants' motions dismissing all of plaintiffs' Fourth Amendment claims except for those alleged by Jennings, Quinones, and Plaskett, on the ground that the facts alleged in the complaint and plaintiffs' supporting affidavits did not as a matter of law rise to the level of a seizure under the Fourth Amendment (A-119-123).

The court granted summary judgment dismissing all surviving claims against the SUCO defendants and State Police defendants based on affidavits that they lacked personal involvement with any of the plaintiffs (A-121, 123). The district court also granted summary judgment dismissing all claims against City of Oneonta Police defendants Redmond and Olsen (A-123, 127). All other claims were either dismissed by the district court or by stipulation of the parties. Plaintiffs discontinued the Fourth Amendment claims of Jennings, Quinones, and Plaskett by stipulation, resulting in entry of a final judgment on September 9, 1998.

B. Decisions of the Second Circuit Court of Appeals

In its initial decision dated October 26, 1999, the Court of Appeals unanimously affirmed the dismissal of all claims under the Equal Protection Clause and 42 U.S.C. § 1981. The court, however, reversed and vacated summary judgment which the district court had granted dismissing the Fourth Amendment claims of Jean Cantave and Sheryl Champen.

On August 8, 2000, the Court of Appeals issued an amended decision adhering to its prior rulings. As it had in its initial decision, the court stated that a plaintiff can plead intentional discrimination under the Equal Protection Clause in one of three ways: First, a plaintiff can challenge a law or policy that expressly classifies persons on the basis of race, thereby invoking strict scrutiny; second, a plaintiff can allege that a facially neutral law or policy has been applied in an intentionally discriminatory manner; and third, a plaintiff can allege that a facially neutral law or policy has an adverse effect on racial minorities and was motivated by discriminatory animus (A-15).

The court noted that the plaintiffs in this case seek to plead an equal protection violation on the basis of a policy that expressly classifies persons on the basis of race (A-15). The court rejected the district court's view that it was necessary for plaintiffs to allege the existence of a similarly situated group that was treated differently in order to plead a cause of action based on this theory (A-15-16).

Nevertheless, the Court of Appeals affirmed the dismissal of plaintiffs' equal protection claims. Noting that this investigation was not based on racial stereotypes or profiles, but rather on a specific description given by the victim of the crime, the court found that, contrary to plaintiff's argument, the complaint simply did not allege a race-based classification (A-16-17):

> In short, plaintiffs' factual premise is not supported by the pleadings: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a

> crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault–a description that included race as one of several elements–defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found.

The court continued in its analysis, holding that there is no allegation of discriminatory intent to support any claim that a facially neutral policy was applied with racially discriminatory intent (A-19). The court acknowledged that in a predominantly white community like Oneonta, police practices such as those alleged here might have a disparate impact on small minority groups, but noted that the Equal Protection Clause "has long been interpreted to extend to governmental action that has a disparate impact on a minority group only when that action is undertaken with discriminatory intent" (A-19). Given the absence of any factual allegation to support a finding of racial discriminatory intent, plaintiffs' claim could not proceed on that theory.

Finally, the court acknowledged the sense of frustration doubtlessly felt by those who were questioned during the investigation and the desirability of maintaining trust between the police and the community they serve, but pointed

out that the court's role was to determine only whether the investigation was conducted in violation of the Equal Protection Clause (A-19-20). The court held it was not. The court stated in a footnote, "to the extent that this opinion clarifies equal protection law, the district court is free on remand to entertain a motion to replead. We express no opinion on the merits of any such motion" (A-20).

Plaintiffs petitioned to the Court of Appeals for rehearing or rehearing *in banc* from the amended opinion. The petition was denied. Judge Calabresi dissented from the denial, in an opinion joined in part by Judges Straub, Sotomayer and Parker. He argued in dissent that plaintiffs stated an equal protection claim by alleging that police ignored the nonracial components of the physical description given to the police and questioned persons who, except for the racial description, did not fit the description (A-77-104). Thus, in his view, plaintiffs alleged that defendants effectively created a racial classification triggering strict scrutiny. Judge Straub, also dissenting from the denial of *in banc* review in an opinion joined by Judge Calabresi, would have held that strict scrutiny equal protection review is triggered whenever police rely on a physical description provided by a victim or witness that includes race (A-104-111).[4]

Chief Judge Walker, who authored both the initial and amended panel opinion, wrote a further opinion concurring in the denial of *in banc* review. Judge Walker rejected Judge Calabresi's "creative (and strained)" reading of the complaint, stating that the court properly "declined to reach out and embrace this new untested rule on facts that do not

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4. Judge Kearse also dissented from the denial without opinion and without joining either dissenting opinion.

put it at issue" (A-63). Calling the proposed rule "flawed and unworkable", Judge Walker noted that such a rule would severely hamper law enforcement efforts. He observed further that the Fourth Amendment adequately balances the needs of law enforcement against the rights of citizens to be protected (A-66-73). Judge Jacobs joined in Judge Walker's opinion but wrote separately to emphasize that Judge Calabresi's reading of the complaint "relies on an aggressive interpretation of passages juxtaposed from here to there, and conceives a claim that the plaintiffs themselves did not urge" (A-75). In his view, Judge Calabresi's proposed rule is not only unworkable but also "based on unexamined notions now current in the *bien pensent* community rather than on any previously understood principles of policing or * * * constitutional law" (A-76).

C. Further Proceedings in the District Court

After the issuance of the rehearing decision, on March 9, 2001, plaintiffs filed in the district court a motion to file a third amended complaint to try to allege facts to show that police ignored the victim's description of her assailant, other than race, and questioned and physically examined African Americans regardless of age and gender. In doing so they seek to plead Judge Calabresi's theory of the case that defendants effectively created an express racial classification which triggers strict scrutiny, or, in the alternative, facts showing discriminatory animus. On March 28, 2001, the district court granted plaintiffs' request for a stay of consideration of that motion pending proceedings in this Court.

REASONS FOR DENYING THE WRIT

I. The court of appeals decision is correct; there is no conflict with any decision of this Court or among the circuits.

The Court of Appeals correctly applied settled law to hold that there is no equal protection violation when law enforcement officials, who are given a limited description of a criminal suspect that consists primarily of race and gender, act on such a description by seeking to question all individuals fitting that description. In such a case, individuals are not questioned solely on the basis of race. They are questioned on the basis of a description given by the victim of a crime, a race-neutral policy used every day by every law enforcement agency in the country. When the police act on a description which originated not with the state but with the victim or a witness, they do not invoke a suspect classification that would be subject to strict scrutiny.

Other circuit courts of appeals have similarly held that where police have a description of a suspect that includes race, focusing on persons meeting that description for questioning is wholly legitimate. *See, e.g., Buffkins v. City of Omaha*, 922 F.2d 465, 468 (8th Cir. 1990) (concluding that officers' identification of defendant in part because of her race was "reasonable and nondiscriminatory in light of the fact that her race matched the racial description of the person described in the tip"), *cert. denied*, 502 U.S. 898 (1991); *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982) (upholding investigatory stop based on race where defendants' race matched description of bank robbers, geographic and temporal proximity, and other observations), *cert. denied*, 459 U.S. 1211 (1983); *see also Dempsey v.*

Town of Brighton, 749 F. Supp. 1215, 1224 (W.D.N.Y. 1990) (rejecting plaintiff's argument that he was singled out for questioning on the basis of race, writing, "The police *knew* that the perpetrator was black. It would have been folly for them to look for anyone other than a person fitting the general description of the robber. If there had been no description of the robber as black, it might well have been impermissible to single out black men but that is certainly not what occurred in this case." [emphasis in original]), *aff'd without opn.*, 940 F.2d 648 (2d Cir.), *cert. denied*, 502 U.S. 925 (1991). Indeed, petitioners have pointed to no case in conflict with these decisions.

The point of these cases is that the racial trait of skin color is used in such situations not because of a prejudicial stereotype that a person of a particular race is more likely to commit a crime, but rather because the physical trait or traits associated with a particular race are manifestly germane to the victim's specific identification of the person who committed the crime. Because of the unique relevance to law enforcement activity of physical characteristics including the color of one's skin, law enforcement officials' use of skin color in pursuing investigations of crimes where the suspect's description includes skin color or other physical racial traits is a facially neutral criterion for deciding whom to question or target for further investigation.

II. The question proffered by plaintiffs is not fairly presented by the pleadings in this case.

Plaintiffs seek to present to this Court the question whether the Equal Protection Clause is implicated where law enforcement officials, in response to a report that a young black male committed a crime, targeted for questioning and physical examination the entire minority community of a

municipality based solely on race and to the exclusion of all nonracial identifying information. This question, however, is not before the Court in this case. As Judge Walker explained in his concurring opinion denying rehearing *in banc*, the scenario described in plaintiffs' proposed question presented is simply not alleged in the complaint. Notwithstanding certain conclusory allegations, the specific factual assertions contained in the complaint show that while defendants relied heavily on the racial component of the victim's description, they did not ignore other aspects of that description.

It is not disputed that the victim described her assailant as a black male whom she believed to be young because he ran quickly across the room; that she believed he received a cut on his arm during the struggle; and that the attack occurred just outside the City of Oneonta near the SUCO campus (A-142, 162). In addition, the district court found based on facts submitted on summary judgment motion that a canine unit tracked the scent of the attacker from the scene of the crime to a wooded area at the base of the SUCO campus (A-113).

The complaint's allegations themselves assert that the police relied on other identifying information, including gender, age, geographic proximity, and the possibility of a cut on the hand. Law enforcement officials were directed to "contact hospitals and pharmacies to determine if a non-white male sought treatment for a cut" (A-163). Law enforcement officials contacted SUCO and obtained "a computer generated list identifying the names and addresses of all *male* African-American students at SUCO" (A-164 (emphasis added)). Law enforcement officials then sought out and questioned all students, i.e., *male* students, on the list, as well as African-American faculty and staff (A-164). Finally,

the complaint alleges that, "[h]aving failed to apprehend a suspect, defendant Chandler, upon information and belief, directed the law enforcement officials to begin a city-wide 'sweep' . . . [during which] police made an effort to question and physically examine all non-white *males* in Oneonta" (A-165 (emphasis added)).

Thus, according to the complaint itself, defendants clearly did not disregard gender. The list obtained from SUCO contained the names only of African-American male students, and police sought out only those male students for questioning. Thirty-six of the thirty-seven named plaintiffs are male. Even the single allegation that police stopped Sheryl Champen, a woman, at the bus station does not support plaintiffs' broad claim that the police deliberately disregarded the nonracial aspect of the victim's description. Judge Walker properly noted that although it is possible that the police disregarded gender in this single instance, it is at least equally possible that the police, who did not ask to see her hands, were initially mistaken about her gender or were merely seeking relevant information from persons who were leaving town.

Nor did the police disregard geographic information. They focused, at least initially, on the SUCO campus. All but three of the thirty-seven plaintiffs were SUCO students. Most, although not all, were interviewed on or near the campus. According to the complaint, the police expanded the search only after their previous efforts were unsuccessful.

Finally, there are no factual allegations to support an argument that defendants ignored the elderly victim's belief that her attacker was relatively young because he could move quickly. Defendants' focus was clearly on college students who are more likely to be young then elderly. Indeed, not one of the named plaintiffs alleges that he is elderly.

While the complaint contains the hearsay allegations that defendant Chandler told the local newspapers that the police were trying "to examine the hands of all the black people in the community" (A-165); the conclusory allegations that defendants attempted to stop and question "every non-white person in and around the City of Oneonta" (A-143, 165); and several conclusory allegations that plaintiffs were approached and questioned "solely on the basis of their race" (*e.g.*, A-189, 191, 195), the specific facts alleged, and recited above, directly contradict plaintiffs' general assertion that all black persons were sought out and questioned and that all other identifying information was deliberately ignored.

Except for one plaintiff, the complaint nowhere alleges a specific incident where the police actually departed from the entire description given by the victim. Certainly, there are no specific factual allegations to support their argument that police "systematically strayed from the bounds of the description they were given and stopped 'any and every' African-American in Oneonta" (A-65).

Even if the question proposed by petitioners and Judge Calabresi did fit the factual scenario alleged in the complaint, certiorari would not be warranted. Judges Walker and Jacobs in their concurring opinions denying *in banc* consideration powerfully explained why even under that scenario the police should not be held to have created a racial classification subject to strict scrutiny. Such a rule would impose "paralyzing inhibitions" on law enforcement officials whose actions might trigger liability every time they ask questions of a person who is the same race as the described suspect, even when the officers cannot know whether the person they question satisfies the other identified characteristics or whether the person will eventually turn out to be a suspect.

Given the potential for inaccuracy or confusion in the witness's description, and the possibility for alteration of physical appearance, it is commonplace for police to question individuals who do not fit the description perfectly. It would simply be unworkable if law enforcement officers were subject to liability merely because they questioned someone who fit such a description in terms of race but not in every other respect.

Finally, as Judge Walker also properly observed, the Fourth Amendment prohibition against unreasonable searches and seizures, "carefully calibrated by the Supreme Court over two centuries," adequately balances law enforcement needs against the rights of citizens to be protected (A-67). *See, e.g., Choi v. Gaston*, 220 F.3d 1010, 1012 (9th Cir. 2000) (holding that evidence was sufficient to give rise to a jury question as to whether police had reasonable suspicion to justify stop under the Fourth Amendment or instead acted with racial bias). Where there are legitimate allegations of selective enforcement, the Equal Protection Clause may similarly come into play. *See Whren v. United States*, 517 U.S. 806, 813 (1996). But such is not the case alleged here.

III. This case does not present an opportunity for the Court to address the constitutionality of racial profiling.

This is a case in which law enforcement officials conducted an investigation of a specific crime using a limited physical description of the suspect provided by the victim of that crime which included race. This is not a case where the police used a presumption of criminality based on race, a stereotype, or a racial profile to approach or stop individuals

for questioning where police had no physical description from the victim of the crime. Regardless of whether the police applied race as one of several aspects of the victim's description for determining whom to question (as the panel construed the complaint), or ignored all other non-racial aspects of the description (as Judge Calebresi construed the complaint), this case is simply not a case involving racial profiling.

The panel's opinion was clear on this distinction: Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black (A-16). Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotype that all black Oneonta residents be questioned whenever a violent crime is reported.

Rather, defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand.

This distinction has also been recognized recently by the Sixth Circuit in response to arguments by a criminal defendant that he was targeted for questioning based on his race. *See United States v. Waldon*, 206 F.3d 597, 604 (6th Cir.) (rejecting defendant's argument that he was the object of illegal "racial targeting" or "racial profiling"; "[c]ommon sense dictates that, when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if

descriptions of the perpetrator known to the officer includes race"), *cert. denied*, 531 U.S. 881 (2000); *cf. Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (equal protection claim was stated where plaintiffs alleged that police used racial profiling to target African Americans and Latinos in conducting stops, detentions, interrogations and searches of motorists as part of their drug interdiction efforts); *United States v. New Jersey*, Cir. No. 90-5970 (MLC) (N.J. Dec 30, 1999) (Consent Decree prohibiting racial profiling by New Jersey state troopers in traffic enforcement but expressly permitting them to rely on race or ethnicity where a specific suspect has been described in part by race or ethnicity).

IV. Plaintiffs have now sought permission to file a third amended complaint rendering the issue unripe for review by this Court.

Under the panel's decision below, plaintiffs were entitled to seek permission to file a third amended complaint to try again to allege an equal protection claim in light of its clarifying opinion. Plaintiffs in fact filed such an application on March 9, 2001, although consideration of that application is stayed at petitioners' request pending the proceedings in this Court.

Ordinarily, this Court does not issue a writ to reverse nonfinal orders. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)) ("except in extraordinary case, the writ is not used until final decree"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari where the court of appeals had remanded the case for further proceedings); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993)

(Scalia, J., concurring) (observing that the issue raised was worthy of review but opining that it was prudent to follow ordinary course and grant certiorari only if requested after final decree); *see generally* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice (7th ed.) § 418, at 196. There is no reason to depart from this general practice in this case. Because plaintiffs are seeking to replead their equal protection cause of action, any grant of certiorari is premature.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RICKY BROWN, *et al.*,

Petitioners,

v.

CITY OF ONEONTA, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR CITY OF ONEONTA RESPONDENTS

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the police did not violate the Equal Protection Clause when they used a victim's description of a suspect's race to determine with whom to conduct consensual interviews.

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Respondent City of Oneonta and its named police officers (the City Respondents), submit this brief in opposition to petitioners' petition for a writ of certiorari. The petition should be denied because it seeks review of an interlocutory, fact-specific decision which is based upon settled legal principles and which is not in conflict with any decision of this Court or with any decision of the circuit courts of appeals.

STATEMENT OF THE CASE

This case involves the utilization by city, county and state law enforcement officials of a victim's description of her attacker as a black male to conduct interviews of persons fitting that description. This lawsuit was commenced by all members of the black community in the City of Oneonta in upstate New York who were interviewed by the police in the criminal investigation which followed the assault. The District Court and the Second Circuit Court of Appeals upheld the Fourth Amendment complaints of five individuals who were detained by the police. However, the Second Circuit dismissed petitioners' class-wide claim that the police's actions in limiting their interviews to blacks in the City of Oneonta violated the Equal Protection Clause, as such conduct did not constitute a prohibited racial classification. Petitioners subsequently filed the instant petition for writ of certiorari.

1. On September 4, 1992, an elderly woman was attacked as she slept in a residence located outside the city limits of the City of Oneonta. The woman had just returned from a lecture at the State University College at Oneonta (SUCO) and was in bed when the attack occurred. The woman, who observed only her attacker's hand and/or

arm, identified her attacker as a black male, and assumed he was young because of his quick movements. During the struggle, she and perpetrator were both cut and bleeding. The attacker fled the residence and the police were called. A police canine tracked the assailant's scent in the direction of the SUCO campus but lost its scent.

The criminal investigation was controlled by the state police, and consisted of interviews of the residents of the house, neighbors and persons at local hospitals and pharmacies to determine if a black male sought treatment for a cut. Students on and off the campuses of Hartwick College and SUCO were interviewed, as well as persons at other locations, including the bus terminal and the Federal Job Corps Center.

The involvement of the named City of Oneonta police officers began and ended on September 4, 1992. Officers Redmond and Olsen were the first to arrive at the scene and speak to the victim. Detective-Sergeant Shedlock and Detective Davis made themselves available to assist the state police during the day of September 4, 1992. Shedlock assisted in obtaining a list of black male students at SUCO. Later on, the state police produced lead sheets, which were distributed to the various law enforcement officials assisting in the investigation.

Detectives Shedlock and Davis went to the SUCO campus and other locations to interview students on the lead sheets. According to the detectives, all of the interviews were voluntary in nature. Shedlock and Davis did some additional interviews at locations off campus during the remainder of the day and before they went off duty at approximately 9:00 p.m. Neither Chief Donadio nor Officers Redmond or Olsen

performed any interviews in connection with this case. The investigation by the state police continued for some time after the participation of the City defendants ceased on September 4, 1992. No person has been arrested for the crime in question.

2. The original complaint was filed in March of 1993; an amended complaint was filed in April of 1993; and a second amended complaint was filed in January, 1995. The Oneonta respondents, along with the other respondents, moved on three separate occasions to dismiss the complaints upon the grounds that they failed to state a cause of action, that the individual respondents were entitled to qualified immunity and that the respondents were entitled to summary judgment. While each of the named Oneonta respondents submitted affidavits detailing their actions and limited participation in the investigation, only six petitioners (Quinones, Cantave, Champen, Brown, Morris and Champen) submitted affidavits in opposition to the motion to dismiss and for summary judgment.

The District Court issued four decisions on the motions, and the Court of Appeals issued two rulings. Initially, the district court granted summary judgement in favor of Oneonta officers Redmond and Olsen. (A-11). Petitioners' claims concerning the production of a list of black students by SUCO were dismissed by the Second Circuit Court of Appeals in 1997. *See Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997). The majority of plaintiffs' Fourth Amendment claims were dismissed or discontinued. The only Fourth Amendment claims that presently survive are the claims of Jamel Champen; Jean Cantave; Ricky Brown; and Sheryl Champen. (A-26). The *Monell* claim against the City of Oneonta was also discontinued with prejudice in order to allow the petitioners to immediately appeal the district court's dismissal of their equal protection claims. (A-13).

In its initial decision dated October 26, 1999, the Court of Appeals unanimously affirmed the dismissal of the petitioners' equal protection claims brought under 42 U.S.C. §§ 1981 and 1983. On August 8, 2000, the Court of Appeals issued an amended decision adhering to its prior ruling. The court noted that the petitioners' theory of discrimination presented in the complaint was one of express racial classification, rather than a claim that a neutral law was applied unevenly and with intentional discrimination. (A-15-16). The court stated that the petitioners did not allege that "upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine the suspect must have been black." (A-16). The Court affirmed the dismissal of the claim of racial discrimination asserted by petitioners by noting: "The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found." (A-17).

The decision of the Second Circuit was unanimous. (A-4-27). Petitioners' request for reargument was denied, *Brown v. City of Oneonta*, 203 F.3d 153 (2d Cir. 1999), *amended and superceded*, 221 F.3d 329 (2d Cir. 2000), as was their request for rehearing *en banc*. (A-57).

The District Court was instructed that it could entertain a motion to replead on remand of the case. (A-20 n.9). Following that remand, the petitioners made a motion to amend the complaint so as to adopt the reasoning of Judge Calabresi in his dissent to the decision denying an *en banc* hearing. (Pet. 11). Petitioners sought to allege facts showing that police ignored the victim's description of the assailant by questioning and examining African Americans regardless of age or gender. However, petitioners requested that their motion be held in abeyance pending the outcome of the petition for certiorari.

REASONS FOR DENYING THE WRIT

Petitioners maintain that the use by local police of a victim's description containing the skin color of her attacker is required to be strictly scrutinized under the Equal Protection Clause of the United States Constitution. A three judge panel of the Second Circuit Court of Appeals rejected this claim, noting that because the description of the attacker came from the victim herself, and not from any stereotyping by the police, petitioners' claims of racial profiling or an express racial classification were correctly dismissed. The decision itself is fact-specific; is not in conflict with the precedent of this Court or any other federal circuit; and leaves open the possibility of a repleading on remand of the surviving claims. In short, petitioners cannot demonstrate that any of the traditional reasons for granting certiorari exist, and their claims do not warrant review by this Court.

1. Petitioners declare this case to be one of racial profiling, a phrase used seven times in the first three pages of their argument. (Pet. 12-14). It is not until the 26th page that petitioners acknowledge that ". . . identification cases represent an exception to the general rule that race is an irrelevant and constitutionally impermissible basis for law enforcement action." (Pet. 26). Petitioners' use of the phrase "racial profiling" confuses and fails to reconcile the distinction between police action resulting from descriptions of identity, including skin color, and that which arises from prejudicial stereotyping. Petitioners failed to state an equal protection claim in their complaint because they blurred the clear distinction between impermissible profiling and use of a physical description to pursue investigations.

To a certain degree, both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment control police-civilian encounters. This Court has adopted a balancing test in applying the Fourth Amendment prohibition against unreasonable seizures, which measures the government's interest in crime protection against the individual's interest in privacy. *Brinegar v. United States*, 338 U.S. 160 (1949). As the intrusiveness of an encounter increases, the Court requires a more specific justification by the police. While a full-fledged arrest must be supported by probable cause, a more limited temporary detention is authorized under a lesser reasonable suspicion standard. *Terry v. Ohio*, 392 U.S. 1, 24-27 (1968). However, not all police encounters implicate the Fourth Amendment. Thus, it has been held that a Fourth Amendment seizure does not occur merely because a police officer approaches an individual and asks that person questions. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Such an encounter, while possibly unpleasant, does not violate in any sense a person's right to privacy. As a practical matter, it is also indispensable for the police to be allowed to pursue all leads, even those based upon hunches and gut feelings, with the limitation that their actions cannot go beyond mere questioning without specific justification. This Court has authorized such consensual questioning even where officers have **no basis** for suspecting a particular individual. *Florida v. Bostick*, 501 U.S. 429 (1991) (allowing suspicionless questioning on buses); *I.N.S. v. Delgado*, 466 U.S. 210 (1984) (in factories); *Florida v. Royer*, 460 U.S. 491 (1983) (and in airports). To require police to voice an articulable suspicion prior to questioning individuals, especially at the earliest and most amorphous stage of an investigation, would require "... overruling a long, unbroken line of decisions dating back more than 20 years ..." *Bostick*, 501 U.S. at 439.

With regard to the Equal Protection Clause, this Court has recognized claims based on selective enforcement where the claimant has demonstrated that the policy in question had a discriminatory effect and was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Where the state creates an improper and stereotypical classification based upon race or other protected characteristics of a disfavored group, this Court has been quick to strike it down. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that restricting the freedom to marry based upon race violates the central meaning of the Equal Protection Clause); *McLaughlin v. State of Florida*, 379 U.S. 184 (1964) (cohabitation law which only covers interracial couples constitutes impermissible racial classification); *Brown v. Board of Education*, 347 U.S. 483 (1954) (rejecting the state-created premise that blacks and whites should not attend the same school). For the purpose of addressing petitioners' petition, we can assume that the Court would look upon racial profiling or stereotyping with disfavor. *See United States v. Manual*, 922 F.2d 272 (10th Cir. 1993) (holding *in dicta* that if members of a drug interdiction police unit were to seek consensual interviews from only blacks coming from a bus terminal in their search for narcotics, then this conduct may violate the Equal Protection Clause); *Whren v. United States*, 517 U.S. 806, 813 (1996) (acknowledging that if police selectively enforced traffic laws against blacks, such intentional discriminatory conduct would violate the mandate of equal protection). *But see United States v. Armstrong*, 517 U.S. 456, 470 (1996) (holding that district court erred in assuming that all crimes are committed, proportionately, by all races, in light of statistics that show that 90% of the individuals sentenced for crack cocaine were black, and 90% of the individuals convicted for possession of LSD or pornography were white).

However, none of the foregoing Equal Protection or Fourth Amendment concerns are implicated by the present petition. While the generalized description provided by a victim may be insufficient to satisfy either a probable cause or reasonable suspicion standard, police are not prevented from conducting consensual interviews even where they have **no basis** to suspect an individual. *See Bostick*, *supra*; *Delgado*, *supra*; *Royer*, *supra*. It necessarily follows that the police can limit their investigation and their consensual interviews of potential suspects to blacks, where the victim indicates that the suspect is black.

Similarly, the Equal Protection Clause does not prohibit the police from using race as a factor to guide their investigation of a crime where that characteristic matches the description of the perpetrator. In such a circumstance, the use of skin color is constitutional because it is a criterion with its genesis in the actual facts of the crime, and not from racially motivated assumptions made by a state actor. *United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000) ("Common sense dictates that, when determining who to approach as a suspect of a criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator given to the officer involve race."); *Buffkins v. City of Omaha*, 922 F.2d 465, 468 (8th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991) (holding that police officer's identification of suspect was reasonable and non-discriminatory in light of the fact that suspect's race matched the racial description of the person identified in the tip); *Dempsey v. Town of Brighton*, 749 F. Supp. 1215, 1224 (W.D.N.Y. 1990), *aff'd without op*, 940 F.2d 648 (2d Cir.), *cert. denied*, 502 U.S. 898 (1991) (where police were aware that robbery suspect was black, holding that it was not discriminatory to concentrate their investigation on that race);

United States v. Bautista, 684 F.2d 1286 (9th Cir. 1992) (holding that race can be a relevant factor for a seizure). As noted by one commentator, the use of race as an identifier does not require strict scrutiny " . . . because suspects in all racial groups will be identified in part by their race, reliance upon the witness' description of the perpetrator's race seems to impose equal burdens on all races." Sheri Johnson, "Race and the Decision to Detain a Suspect," 93 Yale L.J. 214, 242-243 (1983). Indeed, in an analogous situation involving lineups, it has been held impermissible for the police **not** to limit their investigation to a particular race. For example, if the suspect is black, the "fillers" in an in-person or photo lineup must match the suspect's skin color, or the identification procedure will be held to be unduly suggestive. *See Foster v. California*, 394 U.S. 440, 442-443 (1969) (holding that participants in a lineup should have same general physical characteristics); *United States ex rel. Smiley v. LaVallee*, 473 F.2d 682, 683 (2d Cir. 1973) (holding that a lineup was not impermissibly suggestive where the suspect and the five fillers were all black).

The petitioners' reliance on *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), a border search case, is unpersuasive. Petitioners cite that case as authority for the proposition that law enforcement actions based on race and/or national origin are prohibited and, by implication, that police cannot question an individual because of his race or ancestry. (Pet. 20-21). In fact, *Brignoni-Ponce* held that Mexican ancestry **was** a relevant factor police may consider under the circumstances of that case, but that that factor, standing alone, was insufficient to satisfy the reasonable suspicion standard for stopping a moving vehicle. 422 U.S. at 886-887. *Brignoni-Ponce* does not, therefore, invalidate police action which is based on race or ancestry,

particularly where that characteristic is legitimately connected to the crime being investigated. *Accord United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (referrals by border agents of vehicles to a secondary inspection area on the basis of Mexican ancestry does not violate the Constitution).

The case of *I.N.S. v. Delgado*, 466 U.S. 210 (1984) is even more to the point. In that case, members of the INS entered work sites and questioned workers to determine if they were illegal aliens. *Id.* at 211-212 (1984). The INS agents were looking for aliens from Mexico working at Southern California factories, and swept through workplaces questioning most of the workers. *Id.* at 212. The selection of the subject was presumably based on physical characteristics of Mexican ancestry. *Id.* at 223-24, 233-34. The Supreme Court rejected the Court of Appeals' ruling that the individuals could not be questioned in the absence of particularized suspicion, and upheld the "factory sweep" under the Fourth Amendment. *Id.* at 219-221. Petitioners' argument in this case is, in effect, an attempt to impose this very same reasonable suspicion standard on consensual interviews. (A-189 "Defendants' law enforcement officials seeking out, approaching, questioning . . . plaintiffs were based, not on any requisite level of suspicion, but solely on plaintiffs' race.").

Alternatively, petitioners argue that when race or national ancestry is used by police, the district court should impose a strict scrutiny test which will likely invalidate the police action. This argument simply defies common sense. Respondents accept that race or national origin, standing alone, does not justify a seizure. Respondents accept that had the police merely assumed the a suspect was of a particular race, acting upon the assumption may constitute

an impermissible classification. However, respondents reject petitioners' argument that utilizing a significant and identifiable physical characteristic provided by the victim to limit the scope of the investigation somehow violates equal protection principles.

The petitioners' challenge of the police investigation in this case is simply misplaced. The complaint does not allege invidiously discriminatory animus by a particular police officer or officers. It does not establish, according to the careful analysis of the District Court, a claim of selective treatment. Petitioners' sole class-based claim, based on a racial classification, was properly rejected by the Second Circuit on the basis that it was not a state-imposed classification at all, but rather was a description by the victim which the police had every right to utilize. When a police officer is provided with credible information that a suspect is black, his conscious decision to concentrate his search on that subsection of the population is neither discriminatory nor unconstitutional.

2. There are additional factors which mitigate against this Court exercising its jurisdiction to review this case. Initially, the present decision is interlocutory in nature. The Second Circuit has acknowledged the possibility of repleading (A-20 n.9), and a motion to amend the complaint has already been filed. It may be that resolution of said motion will avoid the need to decide the present Constitutional claim.

Second, the Circuit Court was clear that this case was to be resolved solely on facts that were particular and unique:

> The plaintiffs have argued that there is little difference between what occurred here and an

> unlawful profiling based on a racial stereotype. While we disagree as a matter of law and believe that the conduct of the police in the circumstances presented here did not constitute a violation of the equal protection rights of the plaintiff, we do not establish any rule that would govern circumstances giving rise to liability that are not present in this case.

(A-20). Fact patterns which are case-specific have traditionally not been reviewed by the Supreme Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Moreover, this is not a case of racial profiling or stereotyping. A review of such issues by this Court should await a case where those issues are actually presented by the facts of the case in a concrete and final manner. *The Munrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

Finally, there is no need for this Court to review an interlocutory, fact-specific decision which does not conflict with Supreme Court or other circuit court precedent, and which in fact faithfully follows existing equal protection law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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